No. 95-1508-ATX Title: George Price, et al., Appellants
v.
Bossier Parish School Board, et al.

Docketed: March 20, 1996 Court: United States District Court for the District of Columbia

Vide:
95-1455

Entry	Date	Proceedings and Orders
	Feb 23 1996	Application (A95-703) to extend the time to file a jurisdictional statement on appeal from March 2, 1996 to March 18, 1996, submitted to The Chief Justice.
	Feb 28 1996	Application (A95-703) granted by the Chief Justice extending the time to file until March 18, 1996.
	Mar 18 1996	Statement as to jurisdiction filed. (Response due April 19, 1996)
	Apr 8 1996	Motion of appellee Bossier Parish School Board to dismiss or affirm filed. VIDED.
	Apr 19 1996	Reply brief of appellants filed.
	Apr 24 1996	DISTRIBUTED. May 10, 1996
	May 13 1996	REDISTRIBUTED. May 17, 1996
	May 20 1996	REDISTRIBUTED. May 24, 1996
	May 28 1996	REDISTRIBUTED. May 31, 1996
	Jun 3 1996	PROBABLE JURISDICTION NOTED. SET FOR ARGUMENT December 9, 1996. **********
	Jun 26 1996	Order extending time to file brief of appellant on the merits until August 1, 1996.
	Aug 1 1996	Brief of appellants George Price, et al. filed. VIDED.
	Aug 1 1996	Brief amici curiae of American Civil Liberties Union, et al. filed. VIDED.
	Aug 1 1996	Brief of appellant Janet Reno, Attorney General filed. VIDED.
	Aug 1 1996	Joint appendix filed.
	Aug 2 1996	Order extending time to file brief of appellee on the merits until September 17, 1996.
	Aug 12 1996	Record filed.
	Aug 15 1996	Brief amicus curiae of Pacific Legal Foundation filed. VIDED.
	Sep 17 1996	Brief of appellee Bossier Parish School Board filed. VIDED.
	Oct 2 1996	Motion of the Acting Solicitor General for divided argument filed.
	Oct 21 1996	Motion of the Acting Solicitor General for divided argument GRANTED.
	Oct 21 1996	Reply brief of the Federal Appellant filed. VIDED.
	Oct 21 1996	Reply brief of appellants George Price, et al. filed. VIDED.
	Oct 29 1996	CIRCULATED.
	Dec 9 1996	ARGUED.

Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

GEORGE PRICE, *ET AL.*,

Appellants,

v.

BOSSIER PARISH SCHOOL BOARD,

Appellee.

On Appeal from the United States District Court for the District of Columbia

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JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

I. Whether evidence probative of discriminatory purpose under *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), may be excluded from consideration in a preclearance action under Section 5 of the Voting Rights Act solely because that evidence also would be relevant to a discrimination action brought under Section 2 of the Act.

II. Whether evidence probative of discriminatory purpose under *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), may be excluded from consideration in a preclearance action under Section 5 solely because the election plan at issue is not retrogressive.

III. Whether the court in a Section 5 preclearance action may itself assume the burden of explaining and rebutting clear evidence of discriminatory purpose when the covered jurisdiction itself fails to carry that burden.

IV. Whether a covered jurisdiction meets its burden of proof in a Section 5 preclearance action when it identifies some nondiscriminatory reason for its redistricting plan, but then fails to rebut clear evidence showing other discriminatory reasons for the plan.

V. Whether the fact that a non-retrogressive voting change would result in a clear violation of Section 2 constitutes an independent basis for the denial of preclearance under Section 5.

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JURISDICTIONAL STATEMENT

OPINION BELOW

The decision of the United States District Court for the District of Columbia ("D.C. District Court") is reported at 907 F. Supp. 434 (D.D.C. 1995). App. 1a-65a.[1]

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[1] In this Jurisdictional Statement, filed on behalf of Defendant-Intervenors George Price, *et al.*, citations are to the Appendix ("App.") filed with the Jurisdictional Statement of Janet Reno, *et al.*, on March 11, 1996.

JURISDICTION

The decision of the three-judge panel of the D.C. District Court, which had jurisdiction pursuant to 42 U.S.C. § 1973c, was entered on November 2, 1995. The notice of appeal on behalf of defendant-intervenors George Price, *et al.* ("Defendant-Intervenors"), was filed on January 2, 1996. *See* Appendix attached hereto. On February 28, 1996, the Chief Justice extended the time in which to file a jurisdictional statement to March 18, 1996. This Court has jurisdiction over this appeal pursuant to 42 U.S.C. § 1973c.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." The Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." Sections 2 and 5 of the Voting Rights Act, 42 U.S.C. § 1973, 1973c are reproduced in the Appendix. App. 165a-167a.

STATEMENT

I. INTRODUCTION

In this case, the stipulated and unrebutted evidence "demonstrates overwhelmingly" that the Bossier Parish School Board ("Bossier" or the "School Board") adopted its redistricting plan for a discriminatory purpose. App. 63a. Indeed, there was unchallenged evidence with respect to every factor indicating discriminatory purpose set forth by this Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). Therefore, the Attorney General of the United States ("Attorney General") properly refused to administratively preclear Bossier's reapportionment plan

under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c ("Section 5").[2] Moreover, based on her review of the "extensive record" Judge Gladys Kessler, in dissent, concluded "[n]ot only does the evidence fail to prove the absence of discriminatory purpose, it shows that racial purpose fueled the School Board's decision." App. 39a.

Nevertheless, the majority below, Judges Laurence Silberman and Charles Richey, granted preclearance. Through a series of legal errors, the majority refused to consider much of the stipulated evidence, developed its own rebuttal of unchallenged evidence, and applied an incorrect legal standard to the remaining proof of discriminatory purpose. First, the majority erroneously held that evidence of discriminatory intent must be ignored in a Section 5 preclearance action if it also would be relevant in a discrimination case brought under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 ("Section 2"). In addition, the majority excluded other evidence based on its misreading of this Court's recent decision in *Miller v. Johnson*, 115 S. Ct. 2475 (1995), as effectively limiting Section 5's discriminatory purpose inquiry to instances of retrogression. The majority also improperly invented explanations for unrebutted evidence of statements by School Board members that reveal the Board's racial intent. Finally, the majority misapplied *Arlington Heights* by concluding that the presence of some legitimate, non-racial reason for Bossier's decision was sufficient to overcome unrefuted

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[2] Section 5 of the Voting Rights Act bars "covered" jurisdictions from implementing any change in their voting practices until they secure approval—"preclearance"—either from the Attorney General or from the D.C. District Court. To obtain preclearance, the state or locality must bear the burden of proving that its proposed voting change "[1] does not have the *purpose* and [2] will not have [the] *effect* of denying or abridging the right to vote" on account of race. *Id.* (emphasis added).

evidence that a discriminatory purpose also was a motivating factor in the decision.

This radical reworking of the standards governing review of discriminatory purpose under Section 5 conflicts with this Court's clear precedents. The majority's legal errors also create conflicts among the three-judge panels of the D.C. District Court, which has exclusive jurisdiction over Section 5 actions, and pose a significant threat to the fair and effective enforcement of the Voting Rights Act. Finally, the court below also erred in ruling that a clear violation of Section 2 does not provide an independent basis for denying Section 5 preclearance.

II. STATEMENT OF FACTS

Unrebutted evidence of discriminatory purpose, much of it in the form of stipulations, App. 66a-153a (¶¶ 1-285), addressed all of the factors discussed by this Court in *Arlington Heights*: (1) "[t]he impact of the official action whether it 'bears more heavily on one race than another;'" (2) "[t]he historical background of the decision;" (3) "[t]he specific sequence of events leading up [to] the challenged decision [including] . . . [d]epartures from the normal procedural sequence;" (4) "substantive departures . . . [from] factors usually considered important;" and (5) "administrative history" and other "contemporary statements by members of the decisionmaking body." 429 U.S. at 267-68. The facts with respect to each of these areas are summarized below.

A. The Effect of the Plan. In 1992, the School Board adopted a twelve single-member-district reapportionment plan with twelve majority-white districts. Bossier Parish, Louisiana has a population that is 20.1% black, App. 67a (¶ 5), and a voting age population that is 17.6% black. *Id.* at 2a. No black candidate, however, has ever been elected to the twelve-member School Board. *Id.* at 67a (¶ 4). As the

parties stipulated below, this is because voting in Bossier Parish is racially polarized. *Id.* at 122a-27a (¶¶ 181-96).[3] The foreseeable impact of the Board's adoption of a redistricting plan with all majority-white districts, therefore, was to ensure that whenever black voters and white voters prefer different candidates, white voters' preferences will prevail. App. 41a.

It was clearly possible, however, respecting traditional redistricting criteria, to draw a reapportionment plan for Bossier Parish that does not have *all* majority-white districts. App. 41a. The School Board stipulated that it was "obvious that a reasonably compact black-majority district could be drawn within Bossier City," *id.* at 76a (¶ 36), and that the outlines of a second such district in the northern part of the parish were "readily discernible." *Id.* at 114a (¶ 148). Admittedly, by fragmenting or "fracturing" predominantly black residential areas, however, the Board avoided drawing any majority-black districts. *Id.* at 111a, 112a (¶¶ 137-38, 142).

B. The School Board's History. The School Board's history of discrimination against black citizens demonstrates why it wanted twelve majority white districts; so long as black voters had no voice, the all-white School Board could safely ignore their concerns,

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[3] The adverse effects of racially polarized voting on the ability of black voters to elect candidates of their choice are exacerbated in Bossier Parish by the effects of past discrimination. App. 130a-36a (¶¶ 213-32) (past history of denial of access to political system); *Id.* at 136a-38a (¶¶ 234-43) (history of discrimination in education). It was undisputed below that the depressed socioeconomic and educational levels of black citizens of Bossier Parish make it hard for them to obtain necessary electoral information, organize, raise funds, campaign, register, and turn out to vote; these factors in turn cause a depressed level of political participation. *Id.* at 127a-30a (¶¶ 197-202, 206-12).

and for decades, to the present day, this has been the case.

The dark history of voting discrimination in Bossier Parish was undisputed below. App. 130a-36a (¶¶ 213-32); *id.* at 42a-46a. Likewise, the School Board admitted that it segregated its schools, actively resisted desegregation, and has never fully remedied its constitutional violation. In recent years, moreover, the School Board's student and faculty assignment policies have made its schools more racially isolated than they were when it unsuccessfully applied for unitary status in 1979. App. 136a-38a (¶¶ 231-43); *id.* at 45a-46a.

Black citizens have tried without success to alter these policies and practices. Bossier is required by federal court order to maintain a bi-racial committee to "recommend to the School Board ways to attain and maintain a unitary system and to improve education in the parish." App. 103a (¶ 111). The Board admitted that, for decades, it simply ignored this requirement altogether. *Id.* at 103a-04a (¶ 112). In 1993, the Board established a committee, but when black members made substantive suggestions, the Board unilaterally disbanded the committee. App. 105a (¶ 116); *id.* at 46a. As School Board members admitted, they did not want this committee getting into "policy" questions. *Id.* at 46a. Thus, even in the face of a federal court mandate to listen to the concerns of the black community, Bossier refused to do so. Therefore, the black citizens of Bossier Parish are effectively cut off from any opportunity to have a voice in the operation of their public schools. Adopting a redistricting plan with twelve majority-white districts continued this pattern of exclusion.

C. The Sequence of Events Leading Up to Adoption of the Plan. The Board similarly ignored requests by black leaders to participate in the redistricting effort, employing a process characterized by "public silence and private decisions." App. 50a. The redistricting process began in May, 1991, when the

Board decided to develop its own plan rather than adopt the one previously accepted by the Police Jury.[4] Given the fact that the next School Board election was not scheduled until November, 1994, there was no need for hasty Board action. *Id.* at 4a. The Board hired Gary Joiner, the cartographer who had drawn the Police Jury plan. *Id.* He was hired to perform 200-250 hours of work, far more time than would be needed simply to recreate the Police Jury plan. *Id.* at 94a (¶¶ 86-87).

On July 29, 1991, the Police Jury plan was precleared by the Justice Department. App. 3a. The parties stipulated, however, that the Police Jury had provided incorrect and incomplete information in its Section 5 submission. The Police Jury and Gary Joiner were "specifically aware that a contiguous black-majority district could be drawn both in northern Bossier Parish and in Bossier City." *Id.* at 76a, 82a-83a, 84a (¶¶ 36, 52-53, 57). However, they lied to the public, *id.* at 83a (¶ 54), to the only black police juror, *id.* at 81a (¶ 47), and to the Attorney General, *id.* at 87a (¶¶ 65-66), by claiming that drawing any majority-black district was impossible. Despite these misrepresentations, some black community groups opposed the plan and specifically asked that their letter expressing concerns about it be included in the Police Jury's Section 5 submission. *Id.* at 69a, 87a (¶¶ 11, 65-66). Joiner and the Police Jury did not include it. *Id.* Had the Police Jury made a complete and truthful submission, however, the Attorney General clearly would have denied preclearance.

School Board member Thomas Myrick participated in several private meetings with Joiner and white police jurors during this time. App. 5a; *id.* at 81a, 93a-94a

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[4] The Police Jury is the Parish governing body, comparable to a county council or commission in most states. App. 2a; *id.* at 67a (¶ 3).

(¶¶ 48, 85). After these meetings, Myrick, who lives in an area that "would likely be included in any majority black district to be drawn in the northern part of Bossier Parish," *id.* at 81a (¶ 48), recommended that the School Board adopt the Police Jury plan. *Id.* at 95a (¶ 90). On September 5, 1991, however, the School Board decided *not* to adopt the Police Jury plan, largely because it would pit incumbents against each other. App. 47a. Over the course of the next year, School Board members considered a number of redistricting options. *Id.* Mr. Joiner met privately with School Board members and demonstrated different possibilities to them on his computer. *Id.* at 97a (¶ 96). These meetings were not open to the public nor were there any recorded minutes or published notices of the meetings. *Id.*; App. 47a.

While the School Board was meeting and planning in private, the black community was trying, unsuccessfully, to participate in public. *Id.* In March of 1992, George Price, on behalf of a coalition of black community groups, wrote the School Board asking to participate in its redistricting process. App. 5a; *id.* at 96a (¶ 93). Neither the Board nor the Superintendent responded to this request. *Id.* In August of 1992, Mr. Price sent another letter asking specifically to be involved in every aspect of the redistricting process. Again, the School Board made no response. *Id.* (¶ 94).

Frustrated by the School Board's unresponsiveness, Price contacted the NAACP Redistricting Project. App. 98a (¶ 98). The Project developed a partial plan for Price to discuss with the School Board. That illustrative plan consisted of two majority-black districts. *Id.* The plan did not show the other ten districts that made up the Parish. *Id.* When Price gave this information to a school district official, he was told that it would not even be considered because it only showed two districts. *Id.* (¶ 99). Price went back to the NAACP, and a complete twelve-district illustrative plan was drawn up. *Id.* Then, on September 3, 1992, when Price appeared on behalf of

the black community at a Board meeting and presented a new plan showing all twelve districts, including ten majority-white and two majority-black districts, the Board dismissed it summarily, claiming incorrectly that it could not even consider any plan that split precinct lines. *Id.* at 98a-100a (¶¶ 100-02). Until that time, however, the School Board had been actively considering alternatives to the Police Jury plan, almost all of which would have split precincts. *See* App. 29a; *id.* at 72a (¶ 23).

At the School Board's next meeting, on September 17, 1992, Mr. Price again presented the NAACP's illustrative plan. App. 100a-101a (¶ 106). Instead of discussing the plan with Mr. Joiner, or asking him to further analyze the possibility of drawing black-majority districts without splitting precincts (the School Board's purported reason for rejecting the plan, *but see id.* at 72a (¶ 23)), the Board responded by immediately passing a motion of intent to adopt the Police Jury plan. *Id.* at 48a.

On September 24, 1992, an overflow crowd attended the required public hearing on the redistricting plan. App. 7a. Fifteen people spoke against the School Board's proposed plan, most of whom objected because it would dilute minority voting strength. App. 8a; *id.* at 101a (¶ 108). Not a single person spoke in favor of the plan. *Id.* At this hearing, Mr. Price also presented the Board with a petition signed by more than 500 Bossier Parish citizens, asking the Board to consider an alternative redistricting plan. *Id.* at 7a-8a.

Despite the one-sided input from Bossier citizens, and despite the fact that the Board was under *no* time pressure to decide the issue, the Board voted, at its very next meeting on October 1, 1992, to adopt the Police Jury plan. As with the meetings of September 3 and September 17, 1992, the minutes of this meeting reflect virtually no substantive consideration of the Police Jury plan.

Board Member Myrick later testified, however, that the Board adopted the plan that evening because it was "expedient." App. 49a. The Police Jury plan only became "expedient" when the School Board was publicly confronted with an illustration that alternatives to twelve white-majority districts were possible. *Id.* Faced with the growing frustration of the black community at being excluded from educational policy decisions and from the electoral process, the only way for the School Board to ensure a plan with all majority-white districts was to adopt the Police Jury plan quickly, despite its other drawbacks. App. 49a; *id.* at 7a-8a, 28a.

D. The Plan Adopted Compared to the Board's Redistricting Criteria. The Board, without explanation, adopted a plan which departs substantively from its earlier districting plans and ignores factors that it had previously considered paramount. App. 50a. The plan forced incumbents to run against one another. *Id.* at 8a. It also created several districts that, according to its own cartographer, are not compact, *id.* at 111a-12a (¶ 139), including Thomas Myrick's district which contains almost half of the geographic area of the Parish. *Id.* at 112a (¶ 140). These districts do not track school attendance boundaries. In fact, some of them do not even contain a school. App. 8a; *id.* at 112a (¶ 141). However, they do split black communities, and all of them have a white majority. *Id.* at 110a-11a (¶¶ 135-37).

E. The Board Members' Contemporaneous Statements. The School Board "left virtually no legislative history" of its decision. App. 55a n.11. Three School Board members, however, made contemporaneous statements revealing the Board's discriminatory purpose. App. 5a-6a n.4. School Board member Henry Burns told a black acquaintance that while he "personally favors having black representation on the board, other school board members oppose the idea." *Id.* The School Board offered no evidence denying or explaining this statement. School Board

member Barry Musgrove told a prominent black leader that "while he sympathized with the concerns of the black community, there was nothing more he could do . . . on this issue because the Board was 'hostile' toward the idea of a black-majority district." *Id.* Finally, School Board member Thomas Myrick, who lives in an area that could readily accommodate a black-majority district and contains two schools (both of which have student enrollments that are more than 75% black), told black leaders that he would not "let [them] take his seat away from him." App. 5a-6a n.4.

F. The Board's Later Explanations of Its Motives. After the fact, the School Board sought to justify its actions with a flurry of explanations, including several which even the majority below found "clearly were not real reasons." App. 27a n.15. For example, the School Board argued that it adopted the Police Jury plan (on October 1, 1992) to comply with *Shaw* v. *Reno*, 113 S. Ct. 2816 (1993) (decided June 28, 1993), even though *Shaw* was decided nine months *after* the Board adopted its plan. *Id.*

The School Board also reiterated its false claim that it could not adopt a plan without twelve majority-white districts because any such plan would require precinct-splitting, which it erroneously claimed violates state law. App. 56a. Throughout the redistricting process, however, the School Board was willing to split precincts for the protection of incumbents. *Id.* It was only *after* the black community presented its alternative plan that the School Board proffered the "no precinct-splitting" rationale. Indeed, the majority below found that when "the School Board began the redistricting process, it likely anticipated the necessity of splitting some precincts." *Id.* at 29a. Furthermore, it was undisputed that splitting precincts does not violate state law; while the School Board itself may not split precincts, police juries have the authority to establish and modify precinct

lines, and many do so when requested by a school board. *Id.* at 69a-73a, 85a-86a (¶¶ 13-25, 60-61).

Nor did the School Board voice any concern in its initial submission to the Attorney General about a high number of precinct splits causing higher election costs. App. 57a. The Board never estimated the cost of splitting precincts before it voted to adopt the Police Jury plan. *Id.* Obviously, "cost" did not actually motivate the School Board's decision at the time it was made. *Id.*

Bossier's final proffered justification for adopting the Police Jury plan was that it guaranteed preclearance; that is, the Attorney General would approve the School Board's plan because it was identical to the Police Jury plan which already had been precleared. App. 57a-58a. However, "guaranteed preclearance" was not the School Board's main objective; if the School Board's paramount concern had been preclearance, it would not have waited until October 1, 1992—almost 14 months later—to adopt the Police Jury plan. *Id.* If guaranteed preclearance was so important to the Board, it could have acted soon after the Police Jury plan was precleared by the Justice Department on July 29, 1991. *Id.* Moreover, adopting a plan with one or more majority-black districts certainly would not have made preclearance *less* likely.

III. THE PROCEEDINGS BELOW

A. Administrative Preclearance Review. While the School Board had acted precipitously in approving its redistricting plan on October 1, 1992, it was not submitted to the Department of Justice for preclearance until January 4, 1993. App. 103a (¶ 110). After requesting additional information, the Attorney General interposed a timely objection to Bossier's plan. *Id.* at 154a, 106a-07a (¶¶ 118-19). The School Board met in closed session and decided to seek reconsideration. *Id.* at 107a (¶¶ 120-22). The Attorney General denied this

request on December 20, 1993. *Id.* at 159a, 108a (¶ 125).

B. The Declaratory Judgment Action. On July 8, 1994, Bossier filed this action against the Attorney General in D.C. District Court. A group of black voters in Bossier Parish, George Price, *et al.*, intervened as defendants in support of the Attorney General. The Defendant-Intervenors suggested below that the three-judge court decide this case based solely on the issue of discriminatory purpose. The Attorney General agreed that the evidence clearly established discriminatory intent, but also argued that much of the same evidence also established a clear violation of Section 2 and that such a violation constitutes independent grounds for denying preclearance. Rather than possibly face the additional costs of defending a Section 2 lawsuit in Louisiana, Bossier itself also stipulated that "Section 5 preclearance . . . must be denied if the plan violates Section 2." App. 11a n.7; *id.* at 144a (¶ 257). The court below, however, rejected this invitation from the parties and ruled that Section 2 analysis may not be incorporated into a Section 5 review. *Id.* at 11a-24a.

The majority went much further, however, ruling that no "*evidence* of a section 2 violation" may be used to establish "discriminatory purpose under section 5." App. 23a (emphasis added). Ignoring the fact that much of the same evidence used in establishing a Section 2 violation is independently probative of discriminatory intent under *Arlington Heights*, and other precedents of this Court, the majority flatly held that it would "not permit *section 2 evidence* to prove discriminatory purpose." *Id.* at 24a (emphasis added).

The majority then held that this Court's decision in *Miller* also disallowed it from considering the adverse effect of the plan on black voters as evidence of discriminatory purpose. The majority held that "the adoption of one non-retrogressive plan [that contains no majority-black districts] rather than another non-

retrogressive plan that contains [some] majority-black districts cannot by itself give rise to the inference of discriminatory purpose." App. 35a. As a result, the majority excluded from its consideration much of the evidence of discriminatory intent in this case.

Because the majority excluded this evidence, it saw no problem in Bossier's failure to rebut it, effectively relieving the School Board of its burden of proof. The majority likewise shifted the burden of proof away from Bossier to the Attorney General when it developed its own theories about the meaning of contemporaneous statements by Board members. Apparently based on its concerns about the "federalism costs" of Congress' decision to allocate the burden of proof in Section 5 actions to covered jurisdictions, App. 21a n.10, the majority invented explanations for the discriminatory statements of School Board members, even where Bossier had offered no explanation. *See id.* at 30a-32a.

Finally, the majority also erred as a matter of law by concluding that since it found that the School Board had "at least two . . . 'legitimate, nondiscriminatory motives,'" Bossier had met its burden of proof. App. 27a (quoting *New York v. United States*, 874 F. Supp. 394, 400 (D.D.C. 1994)). The majority thus ignored the School Board's burden of producing some evidence that the proposed changes were not also motivated in part by a discriminatory purpose.

Judge Kessler, alone among the panel, considered the entire "extensive record" below and applied the *Arlington Heights* standard. She concluded that Bossier had failed to carry its burden of proving that it acted solely with "legitimate, nondiscriminatory motives." App. 37a (quoting *New York*, 874 F. Supp. at 400). Indeed, Judge Kessler, looking at all the evidence, found that it "demonstrates overwhelmingly" that "racial purpose fueled the School Board's decision." *Id.* at 63a, 39a.

REASONS FOR NOTING PROBABLE JURISDICTION

This Court should note probable jurisdiction because the majority's legal errors in excluding and improperly explaining away plainly probative evidence of discriminatory intent depart from this Court's clear precedents. Likewise, the majority departed from this Court's precedents in ruling that the presence of some legitimate motive was sufficient to meet Bossier's burden of proving the absence of discriminatory purpose under Section 5. Not surprisingly, these dramatic departures from precedent also have created splits among the panels of the D.C. District Court. This Court should resolve these splits. Most importantly, the majority's radical reworking of Section 5 discriminatory purpose analysis poses a substantial threat to the fair and effective enforcement of the Voting Rights Act.

The majority dramatically departed from this Court's precedents and created a split among panels of the D.C. District Court by indicating that it was compelled to ignore much of the probative evidence of discriminatory intent under *Arlington Heights* and *Rogers* v. *Lodge*, 458 U.S. 613 (1982), because it rejected the argument that Section 2 should be incorporated into Section 5. As the unanimous three-judge panel in *Arizona* v. *Reno*, 887 F. Supp. 318 (D.D.C. 1995), *appeal dismissed*, No. 95-299 (Mar. 1, 1996), held, however, whether or not Section 2 is incorporated into Section 5, the standards set forth by this Court in *Arlington Heights* should guide the lower courts' analysis of discriminatory intent under Section 5. The majority's improper standard, which excludes relevant evidence of intent, would insulate all but the most brazen racial discrimination from meaningful Section 5 review.

The majority also misread this Court's decision in *Miller* to limit the discriminatory purpose inquiry under Section 5 to the question of whether there is an intent to retrogress. The majority held that the impact of any non-retrogressive election change cannot give rise to an

inference of discriminatory purpose. App. 35a. Both the decisions of this Court and other decisions of the D.C. District Court, however, make clear that the Section 5 discriminatory purpose inquiry should not be so limited. This case, moreover, demonstrates the fundamental importance of this issue; the majority opinion would effectively insulate from Section 5 review any discriminatory redistricting plan or other voting change in every jurisdiction with no minority representatives and in every jurisdiction in which minority voting strength is already unlawfully diluted.

By refusing to consider both the so-called "Section 2 evidence" and the adverse, albeit non-retrogressive, impact of Bossier's plan on black voters, the majority also effectively shifted the burden of proof on the issue of intent to the Attorney General, although Congress has placed it squarely on the covered jurisdiction. By erroneously excluding such evidence of discriminatory intent (most of it stipulated), the majority relieved Bossier of the burden of rebutting this evidence, a burden the School Board failed even to attempt to meet at trial. The majority, moreover, provided its own "nondiscriminatory" explanations for inculpatory statements by School Board members, when in fact Bossier had offered no evidence explaining these statements at all. These errors improperly shift the burden of proof on the issue of discriminatory purpose and seriously undermine Section 5.

The majority also erroneously ruled that Bossier need only establish at least some non-discriminatory motivations for its decision in order to carry its burden of proof. The proper standard is not, however, whether the Board acted *only* with a discriminatory purpose, but whether, as this Court explained in *Arlington Heights*, such intent was "*a motivating factor*" in the decision. 429 U.S. at 265-66 (emphasis added). This Court should correct this second fundamental departure from

Arlington Heights, because the majority's standard would gravely undermine Section 5.

Finally, the majority held that a clear violation of Section 2 does not constitute an independent basis for the denial of Section 5 preclearance. This misreading of Section 5 would also seriously damage fair and effective enforcement of the Voting Rights Act.

I. THIS COURT SHOULD CORRECT THE MAJORITY'S SUBSTANTIAL DEPARTURE FROM THIS COURT'S DECISION IN *ARLINGTON HEIGHTS* AND RESOLVE THE SPLIT WITHIN THE D.C. DISTRICT COURT CREATED BY THE MAJORITY'S HOLDING THAT PLAINLY PROBATIVE EVIDENCE OF DISCRIMINATORY PURPOSE MUST BE EXCLUDED FROM CONSIDERATION IN A SECTION 5 ACTION IF IT ALSO WOULD BE RELEVANT IN A SECTION 2 ACTION.

The majority erroneously held that any evidence also relevant to a Section 2 claim could not be used to prove discriminatory purpose under Section 5. App. 24a. This unprecedented ruling departs from the controlling decisions of this Court, creates a conflict among panels of the only court with original jurisdiction over Section 5 actions, and would dramatically restrict the scope of Section 5 review.

The proper standard for determining the existence of racially discriminatory purpose in a Section 5 action, as the dissent below recognized, is that set forth in *Arlington Heights*. The majority below, however, made no mention of *Arlington Heights*. App. 39a-40a n.2. In *Arlington Heights*, this Court carefully guided the federal courts on the types of factors to be considered in determining whether there is discriminatory intent. 429 U.S. at 266-68; *see supra* pages 4-5. These factors are not exhaustive, however. *Id.* at 268. Other relevant factors have been discussed in cases such as *Rogers* v. *Lodge*, 458 U.S. 613 (1982). Indeed, courts must look to

"the totality of the relevant facts" to determine whether the challenged system was created or maintained with an intent to discriminate. *Id.* at 618.[5] The majority's exclusion of probative evidence of discriminatory purpose is irreconcilable with the "sensitive inquiry" into the "totality of the relevant facts" that this Court requires. *Arlington Heights,* 429 U.S. at 266; *Rogers,* 458 U.S. at 618.

The record here includes evidence of discriminatory intent in every area discussed in *Arlington Heights* and *Rogers*. Under the rubric of "Section 2 evidence," however, the majority disregarded virtually all of this evidence. Instead, the majority briefly discussed only two types of evidence, the "sequence of events leading to the school board's adoption of the police jury plan" and the "alleged statements of three School Board members." App. 33a, 31a.[6] The majority refused even

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[5] *See also Barnett* v. *Daley,* 32 F.3d 1196, 1203 (7th Cir. 1994) (reversing dismissal of complaint alleging Fourteenth Amendment violation through adoption of redistricting plan which unduly limited number of majority-black election districts); *Buchanan* v. *City of Jackson,* 708 F.2d 1066 (6th Cir. 1983) (summary judgment on intent issue unwarranted in light of circumstantial evidence of discrimination); *Perkins* v. *City of West Helena,* 675 F.2d 201 (8th Cir.) (reversal of finding of no discriminatory intent based on failure to consider all of relevant evidence), *aff'd,* 459 U.S. 801 (1982).

[6] The majority's legal error not only led it to ignore much of the relevant evidence completely, it also infected its factual findings concerning the balance of the evidence. Only by ignoring the plan's actual effects on black citizens, for example, was the majority able to find that the School Board acted to avoid "agitation within the black community" (that is, black participation in a public hearing), *compare* App. 28a *with id.* at 100a-02a (¶¶ 106, 108), and "ominous clouds" over the redistricting (that is, negative public input from black voters), *id.*, and still conclude that the sequence of events it recounts is not even "probative" of discriminatory purpose. App. 33a-34a. As the dissent points out, "the majority's unduly charitable

to consider the rest of the evidence that "demonstrates overwhelmingly" the Board's discriminatory purpose. App. 63a.[7] The majority here used the term "Section 2" evidence to categorize and disregard the voluminous and uncontroverted evidence of historical discrimination, *see e.g., id.* at 115a-40a (¶¶ 153-248), the School Board's recent non-responsiveness to the black community, even in direct contravention of a federal court order, *see id.* at 103a-06a (¶¶ 111-17), and the adverse effect of the redistricting plan on black voters. *See id.* at 23a-25a.

This Court should note probable jurisdiction to correct this error and to reaffirm its prior holdings that in the Section 5 context "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266. As the dissent points out, excluding all so-called "Section 2 evidence," including evidence of historical discrimination and the adverse effect of the plan on black voters, "contravenes [this] Court's explicit direction in *Arlington Heights*." App. 42a-43a n.4.

This Court, moreover, only recently confirmed in *Miller*, that a "new apportionment . . . [that] so

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characterization" of these events as "not . . . laudable" ignores the fact that "School Board Members did more than simply retreat from political debate; in the guise of 'expediency', they excluded black citizens from the only process that would allow that community to elect a candidate of its choice." *Id.* at 58a n.12.

[7] The majority also apparently refused to consider evidence of "history and context" in evaluating discriminatory intent because this "history and context" is in part the reason the School Board "is subject to section 5 at all" and evaluating this "history and context" in more detail than Congress did in enacting the Voting Rights Act would be "double counting." App. 24a n.12. This ruling also is inconsistent with this Court's previous Section 5 discriminatory purpose decisions.

discriminates on the basis of race or color as to violate the Constitution," should be denied preclearance under the purpose inquiry of Section 5. 115 S. Ct. at 2492 (quoting *Beer v. United States,* 425 U.S. 130, 141 (1976)). A Section 5 discriminatory purpose case, therefore, requires an inquiry into whether there is unconstitutional discrimination. To determine whether a reapportionment plan is unconstitutional, according to this Court, requires analysis of the type of evidence discussed in *Arlington Heights* and *Rogers*. In *Rogers*, this Court explicitly considered the factors previously set forth in *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973), *aff'd on other grounds sub nom., East Carroll Parish Sch. Bd.* v. *Marshall*, 424 U.S. 636 (1976), as probative, but not determinative, of discriminatory intent. 458 U.S. at 619-21. These same factors guide a Section 2 court's inquiry into whether the "totality of the circumstances" indicates unreasonable minority vote dilution, but this did not prohibit this Court from relying on them as evidence of unconstitutional discrimination as well. It is illogical and contrary to this Court's decisions to suggest, as the majority does, that evidence probative of a Section 2 violation may not also be probative of intentional vote dilution under the Fourteenth and Fifteenth Amendments.

As the dissent below points out, the majority's decision also conflicts with recent decisions by other panels of the D.C. District Court. App. 42a-43a n.4. Most recently, the unanimous panel in *Arizona* explained that nothing in the statute or the case law leads to the majority's conclusion below: "Although the inquiry required under the purpose prong of section 5 extends in areas that would also be relevant in a section 2 proceeding, this is not equivalent . . . to holding that the [Attorney General] could prevent clearance merely by establishing a section 2 violation." 887 F. Supp. at 323. Such evidence, "in accordance with *Arlington Heights*, [would] be just one factor among many that [the] court would have to consider, together with other evidence in

the record, in determining whether these changes were motivated by a discriminatory purpose." *Id.* at 324 (citing *Busbee v. Smith*, 549 F. Supp. 494, 516-18 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983)). The unanimous panel in *New York* also apparently agreed with the *Arizona* panel, and not with the majority below on this issue: "[D]iscriminatory intent may be inferred from circumstantial evidence, including '[e]vidence of historical discrimination.'" 874 F. Supp. at 401 (quoting *Busbee*, 549 F. Supp. at 517). This Court alone can resolve this split.

Finally, by refusing to engage in the type of inquiry into discriminatory purpose required by *Rogers* and *Arlington Heights*, the majority eviscerates the purpose prong of Section 5. If the Attorney General and the D.C. District Court cannot look at the context and consequences of voting changes, the majority's decision makes clear that only the most brazen racial discrimination, such as that admitted in official minutes, will be prohibited by Section 5. In the 1990's, however, even government bodies bent on discrimination, like the School Board here, know enough to say nothing about their intent on the record. *See* App. 55a n.11. The effect of the majority's truncated analysis, therefore, would be to write the discriminatory purpose prong out of Section 5.

II. THIS COURT SHOULD RESOLVE THE SPLIT WITHIN THE D.C. DISTRICT COURT CONCERNING WHETHER RETROGRESSION IS THE ONLY ADVERSE IMPACT ON MINORITY VOTERS THAT MAY GIVE RISE TO AN INFERENCE OF DISCRIMINATORY PURPOSE UNDER SECTION 5.

The majority also errs in expressly concluding that, in the context of a Section 5 discriminatory purpose inquiry, vote dilution does not count unless it is retrogressive. The parties agreed that Bossier's plan was not retrogressive and, therefore, did not violate the

"effect" prong of Section 5. Nevertheless, the impact of the plan on minority voters is unquestionably an "important starting point" in analyzing discriminatory purpose. *Arlington Heights*, 429 U.S. at 266 (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)). As an alternative basis for refusing to consider the impact of the Board's action on black voters as evidence of discriminatory purpose, however, the majority incorrectly indicated that the "adoption of one non-retrogressive plan [with no majority-black districts] rather than another" plan with one or more cannot by itself give rise to an inference of racial intent. App. 35a, 25a n.13.

In so doing, the majority mistakenly equates this case, in which the School Board has successfully prevented the election of a single black member for its entire history, with *Miller*, in which the Attorney General had refused to preclear an admittedly *ameliorative* plan—*i.e.*, a plan that would have increased the number of majority-black districts. App. 35a. The effect of preventing any black candidates from being elected, however, clearly may "by itself" support an inference of discriminatory intent. Such evidence must be weighed with the other factors described in *Arlington Heights*.

The majority's decision below is in clear conflict with *Miller*. While this Court in *Miller* does quote *Beer*, 425 U.S. at 141, for the proposition that "the purpose of § 5 always has been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise," 115 S. Ct. at 2493, the Court's decision in *Beer* addressed only the meaning of "discriminatory effect" under Section 5. In *Miller* itself, this Court reaffirmed that purposeful racial discrimination remains an independent basis for a Section 5 objection. The Court stated that even an "ameliorative" plan could violate Section 5 if "the new apportionment itself so

discriminates on the basis of race or color as to violate the Constitution." *Id.* at 2492 (citations omitted). If an ameliorative plan can violate Section 5, clearly a plan that perpetuates exclusive white control of the electoral process can as well. In *Miller*, this Court also expressly acknowledged its previous decisions, *see e.g.*, *City of Pleasant Grove* v. *United States*, 479 U.S. 462, 469 (1987), which recognize discriminatory purpose as a distinct basis for the denial of preclearance under Section 5. *See Busbee*, 549 F. Supp. at 516-17; *City of Port Arthur* v. *United States*, 517 F. Supp. 987 (D.D.C. 1981), *aff'd*, 459 U.S. 159 (1982).

The majority's ruling not only misapprehends *Miller*, but also is inconsistent with these other decisions. It is well-settled that in analyzing discriminatory purpose under Section 5, the adverse impact on minority voting rights may be considered even when that impact is not retrogressive. *Busbee*, 549 F. Supp. at 516 (finding discriminatory purpose behind Georgia's refusal to create its first majority black congressional district, despite finding that the adopted plan was not retrogressive). Indeed, this Court has repeatedly conducted or approved a complete inquiry into the presence of discriminatory purpose in cases where there was no retrogression. *Pleasant Grove,* 479 U.S. at 470-71 n.11; *City of Richmond v. United States*, 422 U.S. 358, 378-79 (1975); *Port Arthur*, 517 F. Supp. at 1019.

Other more recent panels of the D.C. District Court have followed these precedents and split with the majority on this issue. The unanimous panel in *New York* found that "a stark pattern of racially discriminatory [though non-retrogressive] effects" could even be "determinative" in a Section 5 purpose inquiry. 874 F. Supp. at 399. The three-judge panel in *Arizona* agreed that non-retrogressive discriminatory effects can give rise to an inference of discriminatory purpose, but disagreed with the *New York* court that such an impact could only be determinative in a "stark" or "extreme"

case. 887 F. Supp. at 322. As the *Arizona* court correctly noted, "[a]doption of such a rule would be entirely inconsistent with *Arlington Heights* and would seriously weaken section 5." *Id.* The majority's rule here would have an even worse effect on Section 5.

Indeed, this case starkly demonstrates why the majority's singular misreading of *Miller*, as effectively limiting Section 5's purpose inquiry to instances of retrogression, makes no sense. Bossier has never had a black School Board member elected. Retrogression here is impossible. Minority voting strength cannot be diluted any more effectively than it already is. The majority's legal error, in refusing to consider the effect of the plan on black voters, transforms the Board's "extraordinary success in resisting integration . . . [into] a shield for further resistance. Nothing could be further from the purposes of the Voting Rights Act." *Pleasant Grove,* 479 U.S. at 472. What Justice O'Connor has termed "the inexorable zero," still has an undeniable resonance as a bellwether of unconstitutional discrimination, *see Johnson v. Transportation Agency*, 480 U.S. 616, 657 (1987) (O'Connor, J., concurring in the judgment). In the context of voting rights, this Court has long recognized that "[b]ecause it is sensible to expect that at least some blacks would have been elected [to the Board], the fact that none have ever been elected is important evidence of purposeful exclusion." *Rogers,* 458 U.S. at 623-24. Indeed, "nothing is as emphatic as zero." *United States* v. *Hinds County Sch. Bd.*, 417 F.2d 852, 858 (5th Cir.), *opinion supplemented,* 423 F.2d 1264 (5th Cir. 1969), *cert. denied,* 396 U.S. 1032 (1970). A situation of exclusive white control cannot be ignored as evidence of racial intent because it technically is not "retrogressive."

Moreover, Bossier is not alone; it is crucial for this Court to correct the error below and to resolve the split within the D.C. District Court on this issue, because there are hundreds of governmental bodies in covered

jurisdictions which, like the School Board, have no black elected members. Countless others may currently dilute minority voting strength, and the majority's opinion would effectively insulate intentional discrimination in these jurisdictions from Section 5 scrutiny as well.

III. THIS COURT SHOULD CORRECT THE SUBSTANTIAL LEGAL ERROR MADE BY THE MAJORITY OF THE SHARPLY DIVIDED THREE-JUDGE PANEL IN SHIFTING THE BURDEN OF PROOF FROM THE SCHOOL BOARD TO THE ATTORNEY GENERAL.

Under Section 5, the burden of proving that the adopted plan does not have a discriminatory purpose rests squarely with the School Board. 42 U.S.C. § 1973c; *South Carolina* v. *Katzenbach*, 383 U.S. 301, 335 (1966); *City of Rome* v. *United States*, 446 U.S. 156, 183 n.18 (1980); *Georgia* v. *United States*, 411 U.S. 526, 538 (1973). Here, however, the majority relieved Bossier of its burden of proof through two different types of legal errors. First, as discussed above, the majority improperly excluded from consideration much of the "extensive record" of discriminatory purpose, App. 37a, relieving the School Board of the burden of rebutting this evidence. Second, with respect to the "direct" evidence of racial intent that it did consider, the majority improperly invented explanations not offered by Bossier.

By inventing its own non-discriminatory interpretations of inculpatory statements by Board members in the absence of any evidence from Bossier, the majority improperly shifted the burden of proof to the Attorney General. The Attorney General and the Defendant-Intervenors offered evidence of statements by Board Members directly indicating that Board members were "hostile" to the idea of black representation on the Board. The School Board failed to offer *any* evidence explaining or rebutting two of these three statements. For example, School Board member Henry Burns said

that Bossier was "hostile to black representation on the School Board." App. 31a. Bossier offered no evidence explaining this statement. Indeed, the majority acknowledges that the School Board did not even "cross-examine . . . on this point." *Id.* Nevertheless, the majority concluded on its own that Burns did not mean that the Board was hostile to "black representation" but that it merely objected to "drawing of majority-black districts in order to ensure black representation on the Board." *Id.* Likewise, with respect to Thomas Myrick's statement to black leaders that he would not let "them" take his seat, the majority, based on no record evidence, attributes this to a "strong desire not to have his district so changed that his constituency is obliterated." *Id.* at 32a.[8]

Explaining away unrebutted evidence, however, is incorrect as a matter of law. The majority misconstrues "the function of judicial review when it . . . speculate[s] upon what *might have*" been meant by these statements. *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 34-35 (1967) (emphasis added). "In light of the courts' customary reliance on a litigant to select the interpretation of the facts most favorable to his own case, this is a singular result indeed." *Miller* v. *WFLI Radio Inc.*, 687 F. 2d 136, 138 (6th Cir. 1982) (vacating

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[8] Of course, the desire not to have his constituency changed can itself be discriminatory, where as here, racially polarized voting makes a predominantly white constituency valuable to a white incumbent. *See Perkins*, 675 F.2d at 214 (similar statement by white public official about difficulty of reelection in black-majority district recognized as "direct evidence of discriminatory intent"). *See also Barnett*, 32 F.3d at 1199 (if "in order to protect incumbents . . . the redistricting authority deliberately adopted devices for limiting black representation (. . . because white incumbents were thought particularly vulnerable to challenge . . .), they would be engaged in deliberate racial discrimination") (Posner, J., citing *Ketchum* v. *Byrne*, 740 F.2d 1398, 1408 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985)).

and remanding Title VII action where trier of fact invented non-discriminatory rationale for defendant's conduct). By inventing non-discriminatory interpretations of Board members' statements, the majority, like the lower court in *WFLI Radio*, deprived the Attorney General and the Defendant-Intervenors of a "fair opportunity" to prove discrimination and misapplied the applicable burden of proof. *Id.* at 139 (citing *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 255-56 (1981)).

The majority made clear the source of its discomfort with the burden of proof established by Section 5. The majority focused on the "federalism costs" of Section 5 and the "anomaly" of "placing a burden of proving non-discrimination on the plaintiff." App. 23a, 25a. As the dissent below points out, however, "Congress decides how to write the country's statutes, and Congress clearly believed that the states' open defiance of the Equal Protection Clause - what [this] Court called an 'insidious and pervasive evil' - was serious enough to warrant the 'federalism costs' of the Voting Rights Act." App. 38a-39a n.1 (citations omitted). The majority was not free to recalculate those costs and implicitly rewrite Section 5.

IV. THIS COURT SHOULD CORRECT THE SUBSTANTIAL LEGAL ERROR MADE BY THE MAJORITY IN HOLDING THAT SECTION 5 REQUIRES A COVERED JURISDICTION MERELY TO ARTICULATE SOME NON-DISCRIMINATORY REASON FOR ADOPTING AN ELECTION PLAN.

While the majority found that a number of the School Board's purported reasons for adopting its election plan were pretextual, App. 27a n.15, it concluded that "at least two of [its alleged reasons] are 'legitimate, nondiscriminatory motives.'" *Id.* at 27a (quoting *New York*, 874 F. Supp. at 400). The presence of some legitimate reason for an action, however, is legally insufficient to establish that it was not unconstitutional

under *Arlington Heights*. Moreover, the majority's decision applies a lower standard to Bossier than did the D.C. District Court panel in *New York*, creating yet another split in the courts below.

The majority acknowledges that the Board lied about several of its alleged reasons for adopting the plan, App. 27a n.15, but nevertheless credits two: "guaranteed preclearance" and "easy implementation." The dissent effectively exposes those rationales as pretextual. *Id.* at 56a-59a.[9] But even accepting these alleged motivations as true, they neither directly refute nor outweigh the voluminous evidence in this record that race was "a motivating factor" in the Board's decision. *Arlington Heights*, 429 U.S. at 265-66.

Arlington Heights left no doubt that proving discriminatory intent does *not* require proof "that the

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[9] The majority also acknowledges that if the School Board knew that the Police Jury plan was approved only by virtue of misrepresentations to the Attorney General, the so-called "guaranteed preclearance" rationale would itself demonstrate discriminatory intent. App. 28a-29a. The majority indicated, however, that it knew "of no evidence suggesting the School Board had any knowledge that the Police Jury plan had been precleared illegitimately." *Id.* The parties stipulated, however, that School Board member Thomas Myrick met several times with police jurors and their cartographer during the police jury redistricting process. *Id.* at 5a, 81a, 85a-86a, 93a-94a, 95a (¶¶ 48, 61, 85, 91). The undisputed record is clear that Mr. Joiner and the Police Jury misrepresented the facts concerning its redistricting to the Attorney General. *Id.* at 68a-69a, 76a, 80a-81a, 82a-83a, 84a, 87a (¶¶ 11, 36, 47, 52-53, 57, 65-66). Myrick, moreover, despite the Board's stipulations about his meetings with Joiner and the Police Jurors, App. 81a, 93a-94a (¶¶ 48, 85); *id.* at 5a (and Joiner's live testimony about "probably half a dozen" such meetings, Tr. 139-42 (April 10, 1995)), felt concerned enough about their implications to deny on the witness stand that any of them took place. Tr. 78-79, 127-28 (April 10, 1995). The majority does not even attempt to reconcile these contradictions.

challenged action rested solely on racially discriminatory purposes." *Id.* at 265. This Court recognized that "rarely" does a government body act "motivated solely by a single concern." *Id.* Therefore, the test must be whether a discriminatory purpose "has been *a motivating factor* in the decision." *Id.* at 265-66 (emphasis added). The majority, therefore, erred in assuming that if a legitimate rationale for Bossier's action, or a nondiscriminatory interpretation of School Board members' statements, were not disproved, Bossier was entitled to preclearance. This Court should correct this serious legal error.

The majority's decision also conflicts with the recent D.C. District Court ruling on this issue in *New York*. In articulating the burden of proof under Section 5, the *New York* court plainly stated that covered jurisdictions must come forward not only with "evidence of legitimate, nondiscriminatory motives" but with evidence "that the proposed changes were not [also] motivated by a discriminatory purpose." 874 F. Supp. at 400. This Court should reaffirm the *Arlington Heights* standard and resolve this split among the panels of the D.C. District Court.

V. THIS COURT SHOULD RESOLVE THE QUESTION OF WHETHER A CLEAR VIOLATION OF SECTION 2 CONSTITUTES AN INDEPENDENT BASIS FOR DENYING PRECLEARANCE TO A NON-RETROGRESSIVE VOTING CHANGE.

The Attorney General has adopted a regulation that states:

> In those instances in which the Attorney General concludes that, as proposed, the submitted change is free of discriminatory purpose and retrogressive effect, but also concludes that a bar to implementation of the change is necessary to prevent a clear violation of amended section 2, the Attorney General shall withhold section 5 preclearance.

28 C.F.R. 51.55(b)(2) (1995). The court below rejected the interpretation of Section 5 implicit in this regulation. Defendant-Intervenors, however concur that the Attorney General has responsibility under Section 5 to object to a voting change that constitutes a clear violation of Section 2. *See* Jurisdictional Statement of Janet Reno, *et al.*, at 23-27 (filed Mar. 11, 1996).

This Court should correct this substantial legal error. However, it may not prove necessary to reach this issue in this appeal because the evidence below, when fully considered, "demonstrates overwhelmingly" that Bossier's action "was a thinly veiled effort to deny black voters a meaningful opportunity for representation on the School Board." App. 63a, 64a.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BOSSIER PARISH SCHOOL BOARD, Plaintiff,	)	
v.	)	
JANET RENO, *Defendant,*	)	Civil Action No. 94-01495 (CRR) (LHS) (GK)
GEORGE PRICE, *et al.,* *Defendant Intervenors.*	)	

DEFENDANT-INTERVENORS' NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that all of the defendant-intervenors in the above named case, George Price, Leroy Harry, Thelma Harry, Clifford Doss, Jerry Hawkins, Odis Easter, Barbara Stevens King, Hurie Jones, Grover Cleveland Jaggers, Floyd Marshall, and Rubie Fouler, hereby appeal to the United States Supreme Court from the final judgment of the three-judge district court, entered on November 2, 1995, granting preclearance, pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, to the plaintiff.

This appeal is taken pursuant to 42 U.S.C. § 1973c.

Respectfully submitted,

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January 2, 1996

[Certificate of Service Omitted in Printing]

Nos. 95-1455 & 95-1508

Supreme Court, U.S.
FILED
APR 8 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES,

Appellant,

and

GEORGE PRICE, ET AL.,

Appellants,

v.

BOSSIER PARISH SCHOOL BOARD,

Appellee.

On Appeal From The United States District Court For The District Of Columbia

MOTION TO DISMISS OR AFFIRM

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35 pp

QUESTIONS PRESENTED

1. Whether the Trial Court was correct in holding that evidence of alleged violations of Section 2 of the Voting Rights Act cannot be used to deny preclearance under Section 5 of the Voting Rights Act.

2. Whether the Trial Court was correct in its findings of fact that the Bossier Parish School Board redistricting plan was adopted without discriminatory purposes.

3. Whether the Trial Court correctly precleared the Bossier Parish School Board redistricting plan.

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APPELLEE'S MOTION FOR DISMISSAL OF APPELLANTS' APPEAL AND/OR AFFIRMATION OF THE JUDGMENT OF THE TRIAL COURT

Appellee respectfully requests that the Court deny the appeals of Appellants Janet Reno, Attorney General of the United States and George Price et al. from the judgment of the United States District Court for the District of Columbia. The Trial Court opinion is reported at 907 F.Supp. 434. (For the convenience of the Court, all citations to the Trial Court opinion will be to the opinion as reproduced in the Appendix attached to the Jurisdictional Statement filed by Appellant, Janet Reno, Attorney General of the United States.) Because the Jurisdictional Statements of both appellants are substantially the same and are based on the same set of facts, this response is directed at both appeals. In this response, we will identify the appeals by designation of the particular appellant.

STATEMENT OF THE CASE

This case should never have been litigated. That it is now posited in the United States Supreme Court emphasizes the wreckage that is so often wrought by the exercise of virtually unlimited authority coupled with an unbridled penchant for social engineering. It illustrates beyond peradventure the danger of zeal untempered by judgment, the quick fix without thought to long term, unsavory political consequences.

In 1991, the Bossier Parish Police Jury, the governing body of the parish, redistricted. The Jury consists of twelve members elected from single member districts. In 1991, eleven members were white, one black. The redistricting plan was unanimously approved by the Jury and

submitted to the Justice Department. After arranging for the relocation of several polling stations, the Justice Department blessed the effort and granted preclearance. (Trial Court Opinion at pp. 3a, 4a.)

Bossier Parish has a population of 86,088 of whom 20.1 per cent are black. Blacks comprise 17.6 per cent of the voting population and 15.5 per cent of the registered voters. Bossier City, the largest city in the parish, has a population of 52,721 of whom 17.95 per cent are black. The remaining black population is scattered throughout the parish in Benton, Plain Dealing, Princeton and Haughton.[1] (Trial Court Opinion at p. 2a.)

Because the concentrations of black residences are so scattered, the Police Jury's cartographer was unable to draw any black-majority districts that were contiguous and compact. (See Complainant's Exhibit No. 17 at pp. 2-6.) After the 1980 census, twelve districts with white majorities had been drawn. Nonetheless, Mr. Jerome Darby, a black, had won two terms, each time in runoffs against a white candidate. After preclearance of its new plan, Mr. Darby ran unopposed. (Trial Court Opinion at p. 2a.)

The Bossier Parish School Board began its redistricting in 1991. There was no emergency because the next school board elections were not scheduled until the fall of 1994. Mr. Gary Joiner, the cartographer who had assisted the Police Jury, was hired by the School Board. He set about his task by discussing with Board members their

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[1] The Justice Department's Jurisdictional Statement states that black residences are concentrated in two areas. Not so. The Trial Court opinion at page 2a has the accurate picture.

preferences.[2] In September, 1991, Board member Thomas Myrick suggested that because the Police Jury and the School Board were the same size, the School Board should simply adopt the Jury plan. His suggestion, although not immediately acted on, planted a seed that matured a year later.

ARGUMENT

I. Adoption of the Police Jury Plan Was Not Racially Motivated

The Trial Court had no difficulty in divining the reasons the School Board adopted the Police Jury plan. The Trial Court found as fact that the motives were not discriminatory. (See Trial Court Opinion at 27a *et seq.*) Two paramount reasons were emphasized by the Court:

1. The Jury plan offered "guaranteed preclearance."

2. The Jury plan offered "easy implementation."

The Trial Court could have added that adopting the Jury plan was less expensive than fashioning a new plan, was a suitable compromise to competing appetencies advanced by the members, would terminate a matter that threatened to divert attention from educational considerations, and obeyed Louisiana electoral law in that it did not require the splitting of existing precincts.[3] In essence,

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[2] Joiner testified that in addition to the usual concerns of incumbents, school board members identify with schools in their districts and try to hold on to them.

[3] The Trial Court had difficulty dealing with the Louisiana Statute that prohibited the splitting of any existing precincts whatever if the Police Jury and the School Board of a parish

the Trial Court found as fact that the School Board presented a *prima facie* case for preclearance. It did not believe that Appellants' rebuttals were sufficient to tip the balance in their favor. (Trial Court Opinion at p. 27a-30a.) The Trial Court rejected the allegations that the Board did not want a black member by pointing out that the Board during the period when it was considering a plan, appointed Mr. Jerome Blunt, a black, to fill a Board vacancy.

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were the same size. See La. Rev. Stat., Title 17, Sec. 71.3E. No one ever alleged that this statute was unconstitutional; had it been so challenged, the Trial Court would have been obligated to invite the Louisiana Attorney General into the suit to defend the statute. The Louisiana prohibition against splitting precincts has no racial overtones. It is based merely on the happy assumption that when the Justice Department preclears a police jury plan on Monday, it will not repudiate its action on Friday. To be sure, some precincts are split with the permission of the Police Juries in matters of this kind, but we are chary of asserting that a Police Jury can violate state law at its whim. Perhaps, a federal court can give a plan splitting precincts its blessing and cure the violation (and again we doubt that a federal court can order violation of a state law without an allegation that the law is unconstitutional), but when the School Board was reviewing its options, its attorney and cartographer both told the Board that splitting precincts was not an option. (Tr. Vol. I. pp. 488, 49, 108, 109, 143, 148.) In any case, the Trial Court found that the NAACP plan advanced at the time split some forty-six precincts, a ridiculous and unprecedented number. But this is sophisticated and slightly convoluted legal reasoning, far beyond the province of the average Board member.

II. The Conduct of the Justice Department

From the beginning, Justice Department personnel along with intervenors were persuaded that Bossier Parish is a cesspool of racial bigotry, a bit of stereotyping that would be denounced with strident indignation if applied to any ethnic or racial minority.[4] This was the predisposition of the Justice Department before any evidence was taken; thereafter, they combed through the evidence in a frantic search for something, just anything, to sustain their predilections. In negotiations prior to this suit, the personnel were stern and unyielding. They made it abundantly clear that nothing less than two black-majority districts would support a preclearance; they also let it be known that they did not care how bizarre the districts appeared, how unsound demographically they were, or how many Louisiana statutes would be violated in the process. One black-majority district would not suffice.

Of course, political entities can always seek justice by filing for a declaratory judgment in the United States District Court in the District of Columbia. Except that few can. Many small entities cannot afford the luxury of resistance which Justice Department personnel warn them will be cost prohibitive. Most of these political entities are represented by district attorneys who are chronically overworked and understaffed, have no knowledge of the Voting Rights Act, have not the time to

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[4] The most pernicious phrase tossed about by the Justice Department involves the right of blacks to elect candidates of their choice, as though it is inconceivable that a black should vote for a white or a white for a black, without regard to the experience of the candidate, his political agenda, and his political appeal.

study it, are largely skilled in criminal law only, and, in short, do not have the resources to counter the inexhaustible funds and live bodies the Justice Department can hurl against them.[5] They are less than thrilled at litigating in a strange court with unfamiliar rules. And, of course, before *Shaw v. Reno*, 113 S.Ct. 2816 (1993) and *Miller v. Johnson*, 115 S.Ct. 2475 (1995), there was every reason to believe that litigating the matter was the proverbial exercise in futility. Entity after entity in Louisiana collapsed, indignation turning to mush, under the pressures exerted by the relentless personnel of the Justice Department. The Bossier School Board alone in Louisiana dared the government and braved the costly litigation in the District of Columbia, not because its membership was racist, but because its cause was just. There is something to be said for sacrifice in pursuit of principle, old-fashioned and trite as it may sound. The determination of a free people to seek justice and to retain control of its electoral system, a precious democratic heritage, should not be confused with racism. It is shameful for Appellants to stereotype the Board members as racists because they are white;

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[5] The Justice Department descended on Bossier Parish in platoon strength. They pored through every record the School Board had and demanded copies of things that were not even remotely relevant. They brought these records to court in a device not unlike the carts used by hotels to tote around baggage. They flew to Washington eight witnesses, three opinion witnesses and a cartographer. At times arrayed against the Board were upwards of a dozen attorneys and support personnel. Supplying what the Justice Department demanded was a full time job. Counsels for the Board felt they could not tax the School Board's resources beyond taking to Washington two board members, the cartographer and the school superintendent. If the United States operates at a fiscal deficit, no one has bothered to tell Justice Department personnel about.

were we to stereotype blacks or other ethnic minorities in the same manner, we would immediately be showered with charges of racism and discrimination. The sad fact is that despite recent Supreme Court and lower courts' opinions, political entities will probably still be bully-ragged and dragooned by the Voting Rights Section of the Justice Department who continue to insist, like Robespierre, that they have a monopoly on virtue.[6]

III. The Trial Court Was Correct in Holding that a Violation of Section 2 Should Not Be the Basis for Denying Preclearance under Section 5.

The Appellant Justice Department in its Jurisdictional Statement argues that alleged violations of Section 2 of the Voting Rights Act should be cause to deny preclearance to a jurisdiction under Section 5 of the Voting Rights Act.

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[6] Lest we be misunderstood, we do not believe that the Voting Rights Act was a mistake. It was needed to correct abuses that had too long persisted. It certainly met the needs and circumstances of the day. We cannot say the same for the distortions of the Act for which the Justice Department is responsible. Even today, we would not dismantle the Act. We would amend it so that preclearances could also be granted by local three-judge federal courts, whose judges take the same oath of office as District of Columbia judges, and have been entrusted with integrating the school system, handling civil cases involving discrimination, handling Section 2 cases under the Voting Rights Act, and presumably have as much integrity and knowledge as federal judges in other parts of the country. It would make it less costly for political entities to seek justice and have their rights vindicated. Mr. Justice Holmes was quite correct when he spoke of rights without remedies. Justice should not depend on the weight of the pocket book.

The argument is threefold: 1) To hold otherwise seriously undermines the Justice Department's efforts to enforce Section 5; (Jurisdictional Statement of the Justice Department p. 13) 2) The legislative history shows that the Senate intended this to be the case; (Jurisdictional Statement of the Justice Department p. 4) and 3) The Attorney General's regulations to this effect (28 C.F.R. Pt. 51, *et seq.*) should be given great deference. (Jurisdictional Statement of the Justice Department p. 14.)

1) *Enforcement of Section 5.* As the Trial Court correctly holds, this Court's decision in *Miller v. Johnson, supra,* disposes of this claim. (Trial Court Opinion, at pp. 20a-24a.) The Trial Court states that the Supreme Court in *Miller* held that

> [T]he manner in which the Attorney General had employed Section 5 of the Voting Rights Act was 'insupportable', and that the Attorney General's incorrect interpretation of Section 5 could not be a compelling state interest sufficient to survive strict scrutiny. (Trial Court Opinion at p. 20a, citing *Miller* at 2492.)

The District Court further points out that the *Miller* Court "noted that the purpose of Section 5 is to avoid retrogression in the position of minority voters, and stated that the 'Justice Department's maximization policy seems quite far removed from this purpose.' " (Trial Court Opinion at p. 21a, citing *Miller* at 2493.)

When the Justice Department denied preclearance in this case they were operating under the same "maximization" policy as the policy repudiated by this Court in *Miller.* As the Trial Court held,

> [D]efendant's argument that the School Board's adoption of the Police Jury plan rather than

> something like the NAACP plan runs afoul of Section 5 is indistinguishable from an argument rejected by the Court in *Miller v. Johnson*. Here, defendant argues that the School Board has failed to provide an adequate reason explaining why it declined to act on a proposal featuring two majority-black districts. The Supreme Court described this position as "insupportable" and stated that Georgia's adherence to "other districting principles instead of creating as many majority-minority districts as possible does not support an inference that the plan 'so discriminates on the basis of race or color as to violate the constitution,' and thus cannot provide any basis under Section 5 for the Justice Department's objection." (Trial Court Opinion at pp. 24a-35a, citing *Miller* at 2492, citations omitted.)

The Trial Court correctly followed this Court's holding in *Miller* and held that

> The key to defendant's position in this case, similarly, is that the School Board has not provided an adequate explantion for adopting the precleared Police Jury plan when it had before it the NAACP plan. As *Miller* makes clear, the adoption of one nonretrogressive plan rather than another nonretrogressive plan that contains more majority-black districts cannot by itself give rise to the inference of discriminatory purpose. . . . The *Miller* Court rejected this theory of Section 5, and we will not resuscitate it here. (Trial Court Opinion at pp. 35a-36a.)

Appellant's argument that the District Court's holding should be overturned because it impedes Justice Department efforts to enforce their *erroneous* interpretation of Section 5, is unavailing.

2) *Legislative History.* As the District Court concluded "We hold, as has every court that has considered the question, that a political subdivision that does not violate either the 'effect' or the 'purpose' prong of Section 5 cannot be denied preclearance because of an alleged Section 2 violation." (Trial Court Opinion at pp. 11a-12a.) Given the serious federalism concerns invoked by Section 5's "extraordinary procedure" of requiring federal preclearance of states' redistricting legislation (Trial Court Opinion at p. 13a); the different functions of the two sections (Trial Court Opinion at pp. 14a-15a); the difference in the allocation of the burden of proof between the two sections (Trial Court Opinion at p. 16a); and the unambiguity of the statutes (Trial Court Opinion at p. 17a); the Court below "would not be pursuaded that what little legislative history defendant has discovered is sufficient to justify the radical expansion of already significant encroachment on the prerogatives of States and their subdivisions." (Trial Court Opinion at p. 17a.)

3) *Deference to Attorney General's Regulation.* In response to the deference argument, the Trial Court pointed out "Wherever else the Attorney General's interpretations of Section 5 of the Voting Rights Act may be entitled to deference, it certainly is not in this court. We will not defer to the Attorney General where, under the statute, an action seeking preclearance may be brought here in the first instance." (Trial Court Opinion at p. 18a citing cases at 18a-19a.)

IV. The Trial Court Considered All Relevant Evidence in Determining Discriminatory Purpose Under Section 5 in This Case

The Trial Court majority correctly held that the Bossier Parish School Board Plan was entitled to preclearance because the plan does not have a discriminatory "effect" and was not adopted with a discriminatory "purpose" but rather was adopted for legitimate, nondiscriminatory reasons.

Appellants argue that even even if a Section 2 violation is no basis for denying preclearance under Section 5, evidence of such an alleged violation (i.e., of factors set forth in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 [1977]) should nonetheless be considered by the District Court in making a determination under the "purpose" prong of Section 5.

As this Court is aware, *Arlington Heights* is not a Section 5 case. The case articulates a much-used standard for evaluating "discriminatory purpose" in constitutional and Section 2 cases. As the Trial Court recognizes, however, this is not the appropriate standard for the "extraordinary procedure" called for under Section 5. The Trial Court's opinion makes clear its analysis of Section 5 and the jurisprudence leads it to the conclusion that the "federalism costs" of Section 5 put it in a different category from constitutional challenges under the Fourteenth and Fifteenth Amendments and Section 2 challenges. The Trial Court held:

> [T]he statutory language sets forth differing standards for the two sections. The line cannot be blurred by allowing a defendant to do indirectly what it cannot do directly. The federalism costs already exacted by Section 5 are seriously

> increased if, under the guise of "purpose" evidence, alleged Section 2 violations must be countered by the political subdivision whenever it seeks preclearance. (Trial Court Opinion at 21a, n.10, 23a.)

Instead, the District Court correctly formulated and utilized the proper "purpose" analysis in a Section 5 proceeding. The Court held that the plaintiff (here the School Board) bears the burden of proving that it did not adopt the Police Jury plan with a discriminatory purpose. (Trial Court Opinion at 24a, citing *Rome v. United States*, 446 U.S. 156, 183 (1980).) The Court goes on to note that "[H]ow this plays itself out in litigation has been left largely unexplored. But a burden of proving non-discrimination on the plaintiff is anomalous under our law; the plaintiff is put in the position of proving a negative." (Trial Court Opinion at 25a.)

The District Court held that

> [O]nce the Board makes out its *prima facie* case, it is entitled to preclearance unless its *prima facie* case is rebutted. . . . If, however, the School Board's evidence is more persuasive than the evidence proffered against it, the School Board is entitled to preclearance. To make out a *prima facie* case for preclearance, the School Board must demonstrate that the proposed change will have no retrogressive effect, and that the change was undertaken without a discriminatory purpose. Proof of nondiscriminatory purpose must include "legitimate reasons" for settling on the given change. (Trial Court Opinion at pp. 26a-27a, cases omitted here.)

The District Court followed a co-equal panel in this analysis. (Trial Court Opinion at p. 27 a, n.14, citing *New*

York v. United States, 874 F. Supp. 394, at 400 (D.D.C, 1994).)

Both the Justice Department and George Price, et al. claim that the evidence of discriminatory purpose presented at trial was probative of the School Board's discriminatory purpose. (Jurisdictional Statement of the Justice Department at p. 15 and Jurisdictional Statement of George Price, et al. at p. 2.)

Even though the Trial Court decided that much of this evidence was not relevant to a Section 5 action (Trial Court Opinion at p. 9a n.6), it may be helpful to elaborate for this Court on the nature of some of the evidence that the Appellants claim the Court below ignored.

The Justice Department and George Price, et al. claim that "The white Police Jurors and their demographer knew, just as the School Board knew during its subsequent redistricting process, that it was feasible to create two reasonably compact black-majority districts." (Jurisdictional Statement of the Justice Department at p. 8, citing Stipulations. 76a #36, 82a-83a #53, 114a #148 and Jurisdictional Statement of George Price, et al. at p. 5.) The referenced stipulations read as follows:

> **#36**: At the time of the 1990-91 redistricting process, some *Police Jurors* were specifically aware that a contiguous black-majority district could be drawn both in northern Bossier Parish and in Bossier City. At the time of the 1990-91 redistricting process, it was obvious that a reasonably compact black majority district could be drawn within Bossier City. "Contiguous" here means that all units of geography in the district have some common border with some adjacent unit." [emphasis added]

> **#53**: At the April 25, 1991 Bossier Parish *Police Jury* meeting, Gary Joiner presented three plans to the *Police Jury*. These alternative plans drawn by Joiner were called Plan 5, Plan 8, and Plan 9. A number of members of the black community attended and asked about the creation of a black-majority district. Joiner stated that the wide distribution of blacks in the parish made a black-majority district "statistically impossible." At deposition, Joiner acknowedged that he knew at that time that drawing two black-majority districts within Bossier Parish was "statistically" possible, in that you could create two majority-black districts at a census block level with the correct population, ignoring precinct considerations. [emphasis added]
>
> **#148**: The northern parish minority district in the Cooper Plan, District 8, is similar in shape and location to District 2 of the NAACP Plan, but is less elongated and more compact. The two are sufficiently similar so that the possibility of creating a district like the Cooper District 8 was readily discernible. However, Cooper District 8 is shorter and more compact.

Where in this "evidence" (which Appellants claim was "ignored" by the Court) is proof that a majority of the *School Board* members knew during their subsequent redistricting process that it was feasible to create two reasonably compact black districts? The evidence clearly shows that they were told by both the demographer and the District Attorney (the two persons upon whose opinons they would most likely and most reasonably rely) that in fact they could not draw the majority black districts in the NAACP plan without violating state law and without violating traditional districting principles. (Tr. Vol. I, pp. 48-49, 108-109, 143, 148.)

The Trial Court pointed out that Defendant and Intervenors below

> contend that the Police Jury plan itself was precleared by the Attorney General only because relevant information was withheld from the Attorney General. In order for this to be evidence that the School Board adopted the Police Jury plan with an impermissible purpose, the School Board would have to have known that such information had been withheld from the Attorney General, and that but for that withholding, the Attorney General would not have precleared the Police Jury plan. We know of no evidence even suggesting the School Board had any knowledge that the Police Jury plan had been precleared illegitimately if in fact it had been. (App. 28a-29a.)

The Trial Court did not *ignore* evidence "that the School Board knew during their subsequent redistricting process that it was feasible to create two reasonably compact black districts". There was no such evidence to be ignored.

As the Trial Court correctly recognized, the fact that the School Board originally did not like the Police Jury plan (because it pit incumbents against each other and did not include schools in every district), argues not for their willingness to subvert these concerns to their discriminatory purpose, but rather the importance they placed on the legitimate purposes, i.e., "guaranteed preclearance" and "easy implementation." (Trial Court Opinion at p. 28a.) As the Trial Court said,

> The Police Jury plan wreaked havoc with the incumbencies of four of the School Board members and was not drawn with school locations in

> mind. When, however, the redistricting process began to cause agitation within the black community, and when it became obvious that any plan adopted by the School Board would give rise to controversy and division (and we find that by the time the NAACP's redistricting plan had been presented to the School Board, the Board could very reasonably foresee this), the Police Jury plan became, as Board member Myrick described it, 'expedient.' Any port will do in a storm, and when the clouds over the School Board's redistricting process began to grow ominous, the only close port was the already precleared Police Jury plan." (Trial Court Opinion at p. 28a.)

Appellants make much of statements made by three School Board members as evidence of discriminatory purpose. (Jurisdictional Statement of George Price, et al. at pp. 10-11 and Trial Court Opinion at p. 30a.) The Trial Court found this evidence unconvincing, as did the dissenting judge. (Trial Court Opinion at pp. 30a-32a and 32a n.17.) And this was, by their own assertion, the "best evidence of discriminatory purpose" put forward by counsel for Intervenors below. (Trial Court Opinion at p. 32a n.17.) The Trial Court majority found that this evidence constituted the "direct" evidence presented by Defendant and Intervenors [Appellants here] and consisted of the alleged statements of three School Board members. The Trial Court concluded that "none of these statements attributed to these Board members, if they were in fact made, show that the Board acted with discriminatory motivation." (Trial Court Opinion at p. 30a.) The dissenting judge found "These statements standing alone would certainly be insufficient to show discriminatory purpose." (Trial Court Opinion at p. 32a n.17.)

The majority in the Trial Court below then discusses the "indirect" evidence. The Court found that the evidence that "defendant relies most heavily upon is the 'sequence of events leading to the school board's adoption of the police jury plan.' " (Trial Court Opinion at p. 33a, citing Defendant's Brief at p.15.) The Trial Court says that "Defendant argues that these events raise an inference that the plan was adopted with a discriminatory purpose." (Trial Court Opinion at p. 33a.) The Court, however, rejects this argument, holding

> [W]e think that assuming that the quick rejection of the NAACP plan is probative of a discriminatory purpose requires at least that the Board have regarded the NAACP plan as a plausible plan. We have no evidence that the plan was, as an objective matter, plausible. . . . And, we have no indication that the School Board itself thought the plan plausible. The existence of the NAACP plan demonstrated to the Board that its efforts to redistrict would be subject to exacting review and vociferous criticism. The swift selection of the only plan around that bore the imprimatur of the Attorney General resembles not a brazen stroke in the name of racist redistricting but an understandable, if not necessarily laudable, retreat from a protracted and highly charged public battle. (Trial Court Opinion at pp. 33a-34a.)

Thus, as the Trial Court found, there is insufficient evidence in the record which is relevant to a Section 5 inquiry to rebut the School Board's *prima facie* case that it adopted the precleared Police Jury plan for legitimate, nondiscriminatory reasons and the judgment of the Trial Court should be affirmed.

V. Appellants' Redistricting Plan Is Neither Appropriate Nor Constitutional

Despite Appellants' assertion to the contrary, the redistricting plan they sponsored as an alternative is neither appropriate nor constitutional. It is not appropriate because it fashions two bizarre and outrageously gerrymandered black majority districts solely for racial considerations. We have already mentioned that the NAACP plan split some forty-six precincts. (Even Creel, their witness on splitting precincts, testified that the most he had seen split was eight.) The final Cooper plan split twenty-four precincts by Cooper's own account. (Tr., Vol. II at pp. 176-177.) In the District Court for the Middle District of Louisiana, the first plan devised by Appellants' cartographer, Mr. William Cooper, was put forward to the Court in a suit brought by certain black Bossier Parish residents as a proper alternative to the Bossier Plan.[7]

The final Cooper plan was a most unimpressive effort. Mr. Cooper obligingly told us that he prepared this plan to fashion two black-majority districts. He admitted to Judge Richey that his districts were not compact; when he was asked by the Court if compactness was important,

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[7] This suit was entitled *Rev. Jesse Carroll Knight, Sr. et al. v. W. Fox McKeithen, Secretary of State*, No. 94-848-A-2, in the United States District Court for the Middle District of Louisiana, Judge John Y. Parker, presiding. Judge Parker characterized the Cooper plan as an octopus with tentacles in all directions. See copy of Judge Parker's comments into the record at the end of the trial in the *Knight* case which forms an exhibit in this case. (See Complainant's Exhibit No. 9.) Judge Parker refused to install Mr. Cooper's plan. The second Cooper plan advanced by Defendant/Intervenors in this case was the same plan as in *Knight* with very insignificant alterations.

he assured Judge Richey that compactness was of no real significance. That is news to us and appeared to be news to the Court as well. (See Tr., Vol. II at pp. 178 *et seq.*)

But if we read *Miller v. Johnson* correctly, the Cooper plan would also be unconstitutional. The majority opinion in the *Miller* case squarely held that Section 5 of the Act did not require maximization of black-majority districts, and, indeed, to fashion districts solely or substantially for racial purposes is a violation of the Equal Protection clause of the Fourteenth Amendment. See *Miller v. Johnson,* 115 S.Ct. at 2493. The *Miller* case made it crystal clear that the Voting Rights Act was intended to prevent retrogression and did not mandate a policy of maximization of black-majority districts so vigorously and uncompromisingly advanced by the Justice Department.

Were this court to invalidate the judgment of the Trial Court, the Bossier Parish School Board would be in a dilemma from which there is no escape. Left to the tender mercies of the Justice Department, it would no doubt be compelled to disobey Louisiana law and install the Cooper plan, the octopus with tentacles in all directions, as Judge Parker so wryly put it. If challenged by white voters, the Board would be compelled to testify that the gerrymandered districts were fashioned for racial reasons only, or perjure themselves and pretend that the bizarre districts were fashioned for reasons other than race. If the Board opted to tell the truth, the plan would clearly be a violation of the Equal Protection clause as *Miller v. Johnson* points out.

VI. The Long Run Consequences

Appellants' interpretations of the Voting Rights Act bear small resemblance to its purposes. To be sure, it was enacted to effect equality in the electoral process, to correct past abuses, to guarantee black voting registration and to promote it, and to put a stop to gerrymandering to dilute black voting strength. The task of administering the Act was entrusted to the Voting Rights Section of the Civil Rights Division of the Department of Justice. The personnel of that section set about their task with fervor and, at times, a vengeance. It was not long before white gerrymandering ceased and impediments to black registration, or even discourtesies in the process, triggered the intervention of federal enforcement agencies. Perhaps Justice Clarence Thomas put it best in *Holder v. Hall,* 114 S.Ct. 2581, 2612 (1994) when he chided the *Thornberg v. Gingles* Court for studiously ignoring the Dole Amendment of 1982: "We have stated time and again that a legislature says in a statute what it means and means in statutes what it says."

"Power corrupts and absolute power corrupts absolutely," commented Lord Acton. Lord Acton's dictum is nowhere more evident than when the Justice Department wields its enormous powers. The Voting Rights Section, burgeoned with young, exuberant social engineers, convinced that they possess a monopoly on virtue, determined to create in its subject territories its own brand of electoral justice. Justice Thomas in *Holder v. Hall,* 114 S.Ct. 2581, 2599 (1994) captured this attitude when he sharply scored the Justice Department personnel for imposing their will on political entities who want only "to avoid costly and disruptive Voting Rights Act litigation," all aided by some federal courts. The opinion of Judge Wiener in *Hays v. Louisiana,* 839 F.Supp. 1188, fn. 21 at

pp. 1196, 1197 (W.D. La. 1994) also was critical of the machinations of Justice Department personnel, as was the Trial Court in *Miller v. Johnson*, 864 F.Supp. 1354, 1362 *et seq.* (S.D. Ga. 1994), to name but a few. Under the draconian program of the government, the wheel of logic has come full circle: blacks are equal to whites, but in Orwellian fashion, some are more equal than others. Gerrymandering in favor of blacks and Hispanics became the standard for the social engineers, the modern day *literati*.

In a few decades American historians will applaud a few of the intentions of the Justice Department and lament the unsavory consequences of its follies, its penchant for quick fixes, its abuse of the immense power it was granted. The historians will wonder how the courts turned blind eyes to a deliberate defiance of the Dole Amendment which so clearly states: "Provided, nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." (See 42 U.S.C., Sec. 1973, 2(6).)

This case, like *Miller v. Johnson, supra* (and countless others unlitigated and unknown to the courts and the public in general), illustrate beyond peradventure the scorn heaped on the Dole Amendment. The Justice Department demanded that the Bossier Parish School Board fashion two black-majority districts, not because proper demographic principles supported two, but because two safe black districts conformed roughly to the proportion of blacks to the population. This was the price for preclearance. In Georgia, the demand was for three black-majority districts because three was approximately the proportion of blacks to the state population. The redistricting plan that had two seats was not enough to please the *literati*. The black witnesses in this case all stated that they were entitled to two seats because two

conformed to their percentage of the population. If the Justice Department did not implant that notion, it certainly did nothing to disabuse its witnesses of it. The demand letters to the School Board from the Justice Department all specified two safe seats, never one.[8] (See Complainant's Exhibit No. 4.)

Historians may be unkind enough to point out that the scheme of emphasizing race, of pitting racial and ethnic groups against one another, of emphasizing differences rather than similarities, has promoted the very hostilities and distrust the Voting Rights Act was fashioned to remove. They might reflect that the creation of a new system of apartheid spelled an end to the American dream of unity, the Americanism that St. John Crevecoeur pridefully wrote about in the early years of our republic, of the pride we took in welcoming into our midst refugees from abroad and assimilating them into our society. The loss of this dream, a sense of national mission, cannot be quantified in a computer, but it is a heritage that makes our nation unique. It is not too much to say that we today are becoming a sharply divided nation stressing, as we do, the issue of race in matters such as affirmative action and electoral redistricting. If this Court

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[8] We are aware that a few courts state that the Justice Department's demand for safe seats reflective of the minority population does not constitute proportional representation. We concede that it certainly is not a pristine copy of the system invented by the Belgian, M. Dhont. But the Dole Amendment does not proscribe proportional representation as an electoral system, it proscribes creating districts with a view to electing protected minorities in numbers proportionate to the population. We challenge anyone to distinguish what the Justice Department demanded in Bossier Parish from the proscription contained in the Dole Amendment.

believes that we are paranoid about this, we suggest that others whose dedication to civil rights has never been challenged are also deeply troubled.[9] A nation cannot as official policy treat races and ethnic groups differently without itself becoming disunited. As the Trial Court pointed out in fn. 12 at p. 24a of its opinion:

> At closing argument, defendant's counsel was presented with the question of whether a school board that affirmatively decides not to take race into account in any way could be found to have violated section 5. Counsel stated that a school board with the history and context of the Bossier Parish School Board which declined to take race into account would indeed violate section 5. This strikes us as double counting. The reason the Bossier Parish School board is subject to Section 5 at all is, at least in part, because of its history and context. Now that it is subject to Section 5, defendant would again cite the School board's history as a reason to saddle it with the additional burden of affirmatively taking race into account in order to prove that it did not have the proscribed purpose.

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[9] See for example, Schlesinger, *The Disuniting of America*, Norton, 1991; Professor Lasch, *The Revolt of the Elites and the Betrayal of Democracy*, Norton, 1995; Sykes, *A Nation of Victims, The Decay of the American Character*, St. Martin Press, 1992; Hughes, *Culture of Complaint*, Warner Books, 1993; Sleeper, *The Closet of Strangers: Liberalism and the Politics of Race in New York*, 1990; and his excellent followup, "The End of the Rainbow," *New Republic*, November 1, 1993. These writers, and many other observers, concur in warning of recreating segregation by treating races differently.

The Court could have gone further. As the Justice Department fans conflict and hostility by arranging confrontation among the races and ethnic groups, and by its policies arranges for and even encourages bloc voting, it then uses the painful results of its misguided zeal as justification for its agenda to erase the very tragedies it has staged. The more apartheid crystalizes, the more the Justice Department can claim its program is indispensable to equality. And so on, *ad infinitum, ad nauseam.* It is a bureaucrat's dream; a self-perpetuating program. It resembles a political commentary co-authored by George Orwell and Franz Kafka.

But what will distress future historians most is that this is one more example of the erosion of the right of plain, ordinary Americans to control their own destinies. Nothing is more precious to democracy than control of its electoral system; nothing erodes a democratic system more than the emergence of a clerisy, a modern day *literati* whose members believe with a certainty that is frightening that they are better and brighter than the rest of us, and that they, and only they, have the virtue and talents to qualify them to rig our election machinery to superintend who will be our Representatives in Congress and state legislatures, who will as judges preside over our system of justice, who will wield power as commissioners, councilmen, school board members and, indeed, the entire gambit of elected offices. Once again issues of substance have been wrested from the public realm and entrusted to an elite presumably to save us commoners from ourselves.[10]

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[10] Lewis Lapham, longtime editor of *Harpers* has charted this movement in *The Wish for Kings,* Grove Press, New York, 1993. In a recent appellate court opinion which by some logical

And yet, the record of America's majority is not really so bad. If Americans were agonizingly backward in our early treatment of dark-skinned peoples (and also Irish, Chinese, Japanese, Jews and slavic immigrants), who in the world was so majestically tolerant and compassionate? The Belgian King, Leopold II, whose myrmidons inflicted unspeakable atrocities on the Congolese? Or the European imperialists who uniformly mistreated Africans and Asians in the name of religion and civilization. Or Bostonians who in 1835 paraded the abolitionist William Lloyd Garrison through the streets with a rope around his neck? Or the mob in 1837 that murdered the abolitionist Elijah Lovejoy in Alton, Illinois? Or the mob of "respectable" citizens of Utica, New York in 1835 including at least one judge, a Congressman and a clergyman who cracked skulls in a rout of a small group of abolitionists who, according to all contemporaneous accounts, were merely minding their own business?

In the "Gilded Age" of the American Industrial Revolution, the much maligned common man persisted in

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tour de force found the right to die written in the Constitution, Judge Andrew Kleinfeld, in dissent noted: "The founding Fathers did not establish the United States as a democratic republic so that elected officials would decide trivia, while great questions would be decided by the judiciary." He might well have been restating Thomas Jefferson who wrote: "State a moral case to a ploughman and a professor, the former will decide it as well, and often better than the latter, because he has not been led astray by artificial rules." Reproduced at page 18 of Roberts and Stratton, *The New Color Line: How Quotas and Privilege Destroy Democracy*, Regnery Publishing, Inc., Washington D.C., 1995. It is embarrassing that most of the world's democracies exhibit a great deal more confidence in the people than do we.

electing state officials who recognized the need for reforms in the work place.

The majority concurred with Woodrow Wilson that Imperial Germany should not stand astride Europe in its jackboots and with Roosevelt, the charismatic patrician in a wheel chair and in his far-reaching reforms, despite the ferocious opposition of so many elites. Americans rejected both communism and fascism, unlike the Italians, Germans, Russians, Hungarians, Poles and the Yugoslavians, to name but a few.

The majority supported the war against fascism and showed extraordinary judgment and compassion in supporting policies that treated our conquered enemies with justice and dignity. The Marshall Plan, the most generous program in the history of the world, was supported whole-heartedly by a vast majority of the people.

And so on. History shows that when the majority seems slow to act, there is no shortage of elites to mount their offensives. As in keeping with Jefferson's belief, their record is not all that thrilling. It was the bureaucratic elite that supported a series of childish policies to assassinate Castro and mounted senseless interventions in Iran, Grenada, Guatamala, Nicaragua, Panama, Vietnam, and Chile, to name only a few. These were "covert" programs, covert for fear that Americans would learn of them and dismantle them. The targets of these policies always knew about them.

Do we waste the Court's time? Perhaps this Court is more interested in who testified to what, or the metrical embroideries the Justice Department employs in transmogrifying the Voting Rights Act into a convenient way to specify who our leaders will be. It is a heady power; small wonder that they fight to retain it. We respectfully

suggest that anyone who can reconcile himself to what the Justice Department is doing has misplaced his priorities. Nothing worse can befall us than to become a federation of races, a Balkan type republic where races and ethnic groups are taught hate and distrust, so tragically embodied among Muslims, Catholic Croatians, Orthodox Serbs, and Albanians. When hatred and distrust are institutionalized, as the Justice Department is on the road to doing, tolerance becomes ever so difficult to restore.[11]

We are not now and never will be free of prejudice. Loves and hatreds, however ugly, are prices we pay for democracy. Love and tolerance cannot be legislated. Resentment flourishes among a free people when an unelected elite herd them about like animals. The path toward unity is not legislation imposing a litany of dos and don'ts on a free people, but in education, social pressures, and programs that treat all people equally and fairly, and stress likenesses rather than differences. This approach has a much better chance of working. The gross anti-semitism of pre-World War II America has waned enormously without extraordinary legislation largely through education, social pressures, and the development of tolerance. In 1979 in *Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102 (1979), this Court in a well reasoned decision decided that cosseting women had the unfortunate result of institutionalizing a belief in their inferiority. It argued that when we tell women they are inferior, we may soon become the architects of their inferiority. Today women in

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[11] The damage already done will persist well into the next century unless this Court restores some balance to the Voting Rights Act. When the census of the year 2000 is finalized, the outrageous and racially gerrymandered districts will have to be retained because Section 5, as the Justice Department reads it, prohibits any retrogression.

law, engineering, medicine, and business testify to the wisdom of that decision. If indeed, people respond better to challenges, why should this widely accepted psychological concept not be equally beneficial to racial and ethnic minorities as well as to women?

The people of Bossier Parish are not the clerisy. It is easy to dismiss them as "bumpkins", "rubes", and "rednecks." Nor is the School Board extraordinary; it consists of housewives, former teachers, local businessmen, a banker and a retired Chief Probation officer in the United State Court system. None is an Ivy League graduate. They take pride in what they do. They are not racists, nor do they claim to be saints. They became stubborn because they deeply resent being patronized at best and denominated "racists" at worst.[12] They have difficulty accepting that they cannot be trusted to do justice. In the election of March, 1996 which took place after the Board was given preclearance, a black was elected outright, and three others will vie for Board seats in the runoff scheduled for April 20, 1996. One black in the runoff got 41% of the vote to his white opponent's 34%; the black may well win that seat. In another race the black and white candidates in the runoff each got 39% of the vote. In the third runoff, the black lagged well behind the white. The outcome, however, may well place as many as three blacks on the Board. See Motion to Supplement the Record filed by Appellee. This election certainly offsets the gloomy testimony of Dr. Richard Engstrom who saw no way for

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[12] It is unfortunate that the designation of "racist" is no more meaningful in most instances than "communist" in the McCarthy era. Calling a person "racist" who does not agree one hundred per cent with one's agenda, is a ploy to place the target on the defensive and extract something from the leverage created.

blacks to be elected under the Board plan. Dr. Engstrom testified that in Bossier Parish there is a degree (unspecified) of racial bloc voting. Because there is a degree of racial bloc voting everywhere (as well as religious bloc voting, gender bloc voting, etc.) the Court appeared to believe that Dr. Engstrom had advanced mankind's knowledge very little. We concur.

The black who won outright ran against another black. He is Julien Darby, brother to Jerome Darby who twice in the 1980s won contested seats on the Police Jury in a white majority district and won an unopposed race in his new white-majority district created after the census. It is illuminating to read the direct testimony of the local NAACP President, Mr. George Price. In commenting on Jerome Darby's political success in three consecutive races, Price comes very near characterizing Jerome Darby as an "Uncle Tom" *because he has not made race an issue.* Never has it occurred to Mr. Price and the Justice Department that perhaps Bossier voters may well be tired of the racial issue and wish to dwell on ideas and performance.

When speaking of the elite bureaucrats in the Justice Department, some historian may recognize a parallel to the oft-quoted comment of Tacitus, defender of republicanism: "they have made a wilderness and called it peace." It is time to correct the imbalance, to give effect to the Equal Protection Clause, and to cease arranging racial confrontations. It would not be a travesty to deliver back to the people control of their electoral systems and the larger measure of democracy that would result. Perhaps this Court might say to the Justice Department what

Cromwell told Parliament: "You have sat too long for the good you have done. . . . In the name of God, go!"

CONCLUSION

For the reasons set forth above, the decision of the Trial Court should be affirmed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
APR 19 1996
CLERK

(3)

No. 95-1508

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

GEORGE PRICE, *ET AL.*,
Appellants,
v.
BOSSIER PARISH SCHOOL BOARD,
Appellee.

On Appeal from the United States District Court for the District of Columbia

RESPONSE OF GEORGE PRICE, *ET AL.*, TO MOTION TO DISMISS OR AFFIRM

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The Motion to Dismiss or Affirm ("Motion") is noteworthy for three things: (1) its scandalous disregard for the record; (2) its unsupported tirades against the Attorney General of the United States; and, most importantly, (3) its confirmation that the decision below raises important issues of law that this Court should resolve.

At this stage of the proceedings only the third point is significant. As to the first, the stipulations alone, *see* App. 66a-153a,[1] expose the Bossier Parish School Board's grave mischaracterization of the facts of this

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[1] In this Response, filed on behalf of Defendant-Intervenors George Price, *et al.*, citations are to the Appendix ("App.") filed with the Jurisdictional Statement of Janet Reno, *et al.*, on March 11, 1996.

case.[2] As to the second, the School Board's irresponsible attacks on the Voting Rights Act and those who enforce it do nothing to diminish the force of the arguments in favor of this Court's review made by these Appellants. The Board's rhetoric, however, does convey the same hostile indignation that has greeted the efforts of African-American voters to be heard in this electoral process and in School Board affairs.

As to the third point, the Motion makes clear that this case raises an important legal issue worthy of this Court's review. The School Board acknowledges that the majority of the three-judge court refused to apply the standards set forth by this Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), in assessing discriminatory purpose under Section 5 of the Voting Rights Act. Motion at 11. As explained in the Jurisdictional Statements, this legal error substantially departs from this Court's precedents, creates a split among the panels of the District Court for the District of Columbia, and undermines fair and effective enforcement of the Voting Rights Act.

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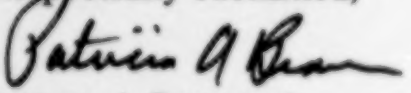
[2] We will not even attempt to catalogue here the free-wheeling falsehoods rampant in the Motion. An example may be instructive. On page 2, the School Board erroneously claims that "[b]ecause the concentrations of black residences are so scattered, the Police Jury's cartographer was unable to draw any black-majority districts that were contiguous and compact" and, on page 18, suggests that the Board could only have drawn a plan without twelve-of-twelve white-majority districts if it created "bizarre and outrageously gerrymandered black majority districts." On pages 13 and 14, however, the Board itself quotes stipulations establishing that Police Jurors and their cartographer were specifically aware that compact and contiguous majority black districts could be drawn in Bossier Parish. App. 76a, 82a-83a, and 114a (¶¶ 36, 53, 148).

The Court should note probable jurisdiction.

Respectfully submitted,



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Supreme Court, U.S.
FILED
AUG 1 1996
CLERK

(1) (6)

Nos. 95-1455 and 95-1503

In the Supreme Court of the United States

OCTOBER TERM, 1995

JANET RENO, ATTORNEY GENERAL
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v.

BOSSIER PARISH SCHOOL BOARD

GEORGE PRICE, ET AL., APPELLANTS

v.

BOSSIER PARISH SCHOOL BOARD

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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Probable Jurisdiction Noted June 3, 1996

300 pp
4 x 10

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Docket for Case #:
94-CV-1495

BOSSIER PARISH SCHOOL BOARD, PLAINTIFF

v.

JANET RENO, DEFENDANT
GEORGE PRICE, AND NINE OTHERS,
INTERVENOR-DEFENDANT

Assigned to: Judge Charles R. Richey
Circuit Judge Laurence H. Silberman
Judge Gladys Kessler
Referred to: Three Judge Panel

Demand: $0,000 Nature of Suite: 890
Lead Docket: None Jurisdiction: US Defendant
Dkt# in other court: None

Cause: 42:1973 Voting Rights Act
Case type: 1. civil 2. null

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LEROY HARRY intervenor-defendant	Samuel L. Walters (See above) [COR LD NTC ret]
THELMA HARRY intervenor-defendant	Samuel L. Walters (See above) [COR LD NTC ret]
CLIFFORD DOSS intervenor-defendant	Samuel L. Walters (See above) [COR LD NTC ret]

JERRY HAWKINS intervenor-defendant	Samuel L. Walters (See above) [COR LD NTC ret]
ODIS EASTER intervenor-defendant	Samuel L. Walters (See above) [COR LD NTC ret]
BARBARA STEVENS KING intervenor-defendant	Samuel L. Walters (See above) [COR LD NTC ret]
HURIE JONES intervenor-defendant	Samuel L. Walters (See above) [COR LD NTC ret]
GROVER CLEVELAND JAGGERS intervenor-defendant	Samuel L. Walters (See above) [COR LD NTC ret]
FLOYD MARSHALL intervenor-defendant	Samuel L. Walters (See above) [COR LD NTC ret]
RUBIE FOULER intervenor-defendant	Samuel L. Walters (See above) [COR LD NTC ret]

7/8/94	1	ORDER by Chief Judge John G. Penn: authorizing James J. Thornton, Jr. to appear in this Court in behalf of Bossier Parish for the sole and limited purpose of representing the School Board in its request for a declaratory judgment approving its redistricting plan as being in conformity with the Voting Rights Act of 1965 and the Constitution of the United States. (N) (jeb) [Entry date 07/14/94]
7/8/94	2	COMPLAINT filed by plaintiff(s) BOSSIER PARISH (jeb)[Entry date 07/14/94]
7/8/94	—	SUMMONS(2) issued to federal party(s) defendant JANET RENO, and non-parties: U.S. Attorney and U.S. Attorney General. (jeb) [Entry date 07/14/94]
7/14/94	—	MAILED CJRA brochure, Meet and Confer list, and Notice regarding dismissal to plaintiff(s) BOSSIER PARISH. (jeb)
7/14/94	—	MAILED CJRA brochure, Meet and Confer list, and Notice regarding dismissal to plaintiff(s) BOSSIER PARISH. (jeb)
7/25/94	3	ORDER by Judge Charles R. Richey: directing Clerk of Court to make copies of the complaint and this order and provide them to the U.S. Marshals' Service for service of same upon the AUSA; directing AUSA to show cause why this case is cognizable in this Court and whether a three-Judge Court should be convened, and response to show cause due 4:00 7/29/94; (N) (jeb)

7/26/94	—	SHOW CAUSE issued to defendant JANET RENO (James Thornton, Office of Asst. Attorney General). (dbw) [Entry date 07/28/94]
7/29/94	5	RESPONSE by defendant JANET RENO to Court's show cause order [4-1] (cjp) [Entry date 08/03/94]
8/1/94	4	ORDER by Judge Charles R. Richey: directing that pursuant to 42 USC 1973c, a Three Judge District Court shall be convened to hear and determine this action for declaratory judgment under Section of the Voting Rights Act of 1965, as amended; referring case to the Chief Judge of the USCA for appointment of the other two members of the three judge panel. (N) (jeb)
8/5/94	6	COPY of Order filed in USCA dated 8/4/94, designating Laurence H. Silberman, Circuit Judge, Gladys Kessler, District Judge, to serve with Charles R. Richey, District Judge, to hear and determine this action. (gt)
8/5/94	—	CASE ASSIGNED to Three Judge Panel consisting of: District Judge Charles R. Richey, Circuit Judge Laurence H. Silberman and District Judge Gladys Kessler. (gt)
8/11/94	7	RETURN OF SERVICE/AFFIDAVIT executed upon Asst. U.S. Attorney General on 8/8/94 (lpp) [Entry date 08/17/94]

8/11/94	8	RETURN OF SERVICE/AFFIDAVIT executed on 8/3/94 upon James J. Thornton, Esquire, pursuant to Court Order. (lpp) [Entry date 08/17/94]
8/22/94	—	STATUS HEARING before Judge Charles R. Richey & Judge Gladys Kessler: discovery due 10/14/94; plaintiff's dispositive motions due 4:00 10/26/94; defendant and applicant intervenor defendant's response to dispositive motions due 4:00 11/9/94; plaintiff and defendant to file views on the aspect of the South Carolina Case due 8/24/94 by 4:00 p.m; applicant intervenor defendant to file views on case on 8/26/94 by 4:00 p.m. Reporter: Frank Rangus (jeb)
8/22/94	9	MOTION filed by movant GEORGE PRICE and (9) nine others for leave to intervene Attachments (2), EXHIBIT: ANSWER (lpp) [Entry date 08/24/94]
8/23/94	10	MEMORANDUM by defendant JANET RENO; attachments (5) (clv) [Entry date 08/25/94]
8/23/94	11	TRANSCRIPT filed for date(s) of 08/22/94. Reporter: Frank Rangus (jeb) [Entry date 08/26/94] [Edit date 08/26/94]
8/23/94	13	MEMORANDUM by defendant JANET RENO response to this Court's inquiry at the 8/22/94, status conference as to why this Court should not enter injunctive relief, Exhibit (A), Attachments (6) (lpp) [Entry date 08/30/94]

8/25/94	12	MEMORANDUM by plaintiff(s) BOSSIER PARISH on enjoining proceedings in the Middle District of Louisiana in Knight, et al. v. McKeithen, et al. (jeb) [Entry date 08/26/94]
8/26/94	15	MEMORANDUM by movant GEORGE PRICE for intervention, Exhibit (1) (lpp) [Entry date 09/07/94]
8/31/94	14	ORDER by Judge Charles R. Richey: discovery due 4:00 10/14/94; directing the plaintiff and defendant file briefs on injunction issue due 4:00 p.m. 8/24/94; prospective intervenors to file brief on injunction issue due 8/26/94; granting plaintiff leave to file its brief on injunction issue by facsimile; plaintiff to file briefs and dispositive motions due 4:00 10/26/94; defendant and prospective intervenors to file their briefs and dispositive motions due 4:00 11/9/94; directing parties to submit direct testimony in narrative form (N) (jeb)
9/8/94	16	MEMORANDUM OPINION by Judge Charles R. Richey (N) (jeb)
9/8/94	17	ORDER by Judge Charles R. Richey: granting motion for leave to intervene [9-1] by GEORGE PRICE; advising counsel that the Court shall not issue an injunction at this time, but the Court may revisit this issue at a future time, as may be appropriate. (N) (jeb)

9/8/94	21	ANSWER by Defendants-Intervenors TO COMPLAINT [2-1] . (lpp) [Entry date 09/29/94]
9/13/94	18	ATTORNEY APPEARANCE for defendant JANET RENO by Gaye L. Hume (kmk) [Entry date 09/14/94]
9/13/94	19	ANSWER TO COMPLAINT [2-1] by defendant JANET RENO. (kmk) [Entry date 09/14/94]
9/26/94	20	MOTION filed by plaintiff(s) BOSSIER PARISH for relieve complainants of duty to answer certain interrogatories and requests for production of documents, Affidavit (1), Exhibit (1) (lpp) [Entry date 09/29/94]
9/26/94	22	RESPONSE by intervenors in opposition to motion for relieve complainants of duty to answer certain interrogatories and requests for production of documents [20-1] by BOSSIER PARISH, Attachment: (1). (lpp) [Entry date 09/29/94]
10/3/94	23	REQUEST by intervenor GEORGE PRICE for admissions for plaintiff(s) BOSSIER PARISH, Attachments (21) (lpp) [Entry date 10/05/94]
10/6/94	24	ORDER by Judge Charles R. Richey: denying motion for relieve complainants of duty to answer certain interrogatories and requests for production of documents [20-1] by BOSSIER PARISH; granting the defendant-intervenors' objections; denying and overruling the plaintiff's objections (N) (jeb)

10/17/94 25 NOTICE OF FILING by defendant JANET RENO, of an agreed order extending discovery period and certain related filing deadlines, Exhibit (1) (lpp) [Entry date 10/18/94]

10/25/94 26 STIPULATED ORDER by Judge Charles R. Richey: discovery due 10/28/94; plaintiffs' briefs and dispositive motions due 11/9/94; extending time to file proposed findings of fact and conclusions of law due 11/7/94; extending time to 11/23/94 for defendant and defendant-intervenors' briefs and dispositive motions to be filed; (N) (jeb)

11/9/94 27 ORDER by Judge Charles R. Richey: All prior ORders shall remain in full force; Counsel for parties shall Meet Confer hearing set for 4:00 11/18/94, Counsel for parties shall file statements of material facts due by 4:00 11/21/94, and cross motions for summary judgment due 4:00 11/21/94; response to motions for summary judgment due 4:00 11/30/94, reply motions for summary judgment due 4:00 12/5/94; (N) (lpp) [Entry date 11/14/94]

11/9/94 28 ORDER by Judge Charles R. Richey: Meet Confer hearing set for 4:00 11/18/94, statement of material facts which are not in dispute due 4:00 11/21/94;, cross motions for summary judgment due 4:00 11/21/94; response to motion for summary judgment due 4:00 11/30/94 reply motion for summary judgment due 4:00 12/5/94; (N) (lpp) [Entry date 11/14/94]

11/10/94	29	PRETRIAL STATEMENTS by plaintiff BOSSIER PARISH (lpp) [Entry date 11/14/94]
11/16/94	30	MOTION filed by plaintiff BOSSIER PARISH to extend time to comply with the Court Order 11/9/94, Attachment (3) (lpp) [Entry date 11/17/94]
11/17/94	31	RESPONSE by defendant JANET RENO to motion to extend time to comply with the Court Order 11/9/94 [30-1] by BOSSIER PARISH (ted) [Entry date 11/18/94]
11/17/94	32	REQUEST by defendant JANET RENO for clarification (ted) [Entry date 11/18/94]
11/17/94	33	MEET AND CONFER STATEMENT/REPORT PURSUANT TO L.R. 206(d) filed by plaintiff BOSSIER PARISH, defendant JANET RENO, intervenor GEORGE PRICE. (ted) [Entry date 11/18/94]
11/18/94	—	Tele-conference before Judge Charles R. Richey reporter: Frank Rangus (jeb)
11/21/94	34	ORDER by Judge Charles R. Richey: all prior Orders shall remain in full force and effect, except as modified herein (N) (dbw)
11/23/94	35	PRETRIAL STATEMENTS by intervenor GEORGE PRICE, attachments (2) (lpp) [Entry date 11/25/94]
11/25/94	36	PRETRIAL STATEMENTS by defendant JANET RENO, attachments (3) (lpp) [Entry date 11/28/94]

11/30/94 37 JOINT MEMORANDUM by intervenor-defendants of findings of fact and conclusions of law (lpp) [Entry date 12/01/94]

12/19/94 38 NOTICE OF FILING by defendant JANET RENO: Final Version of Direct Testimony (14), bulky pleading (lpp) [Entry date 12/21/94]

12/20/94 39 NOTICE OF FILING by intervenor GEORGE PRICE: Addendum to DIrect[o] Testimony of William Cooper and Jerry Hawkins (2) (lpp) [Entry date 12/22/94]

12/20/94 40 NOTICE OF FILING by defendant JANET RENO; of disputed portions of direct testimony.; attachments (blj) [Entry date 12/22/94]

12/20/94 41 NOTICE OF FILING by defendant JANET RENO of original final version of direct testimony of Gary Dillard Joiner; attachments (1) (blj) [Entry date 12/22/94]

12/21/94 42 NOTICE OF FILING by plaintiff BOSSIER PARISH: Rebuttal Testimony (2) (lpp) [Entry date 12/23/94]

12/22/94 43 NOTICE OF FILING by defendant JANET RENO, intervenor GEORGE PRICE: Filing of Disputed portions of Rebuttal Testimony (2), Attachment (2) (lpp) [Entry date 12/23/94]

1/3/95	44	NOTICE OF FILING by defendant JANET RENO/United States: Corrected Pleading - Notice By U.S. and Defendant-Intervenors of filing of disputed portions of rebuttal testimony, Exhibit (1), Attachment (2) (lpp) [Entry date 01/06/95] [Edit date 03/30/95]
1/10/95	45	ORDER by Judge Charles R. Richey: directing counsel to advise Judge Richey, in writing, by 1/17/95 4:00 p.m. as to whether they consent to having undersigned Judge hear testimony and evidence, and transmit ensuing record to Circuit Judge Silberman and District Judge Kessler for review; upon review, the three Judges shall have oral argument to consider the record and briefs of Counsel; telephonic status hearing set for 2:00 1/18/95 (N) (dbw)
1/18/95	—	STATUS HEARING (TELECONFERENCE) before Judge Charles R. Richey: bench trial set for 10:00 4/10/95 Reporter: Susan Tyner (dbw)
1/18/95	46	ORDER by Judge Charles R. Richey: directing Counsel to meet and confer by 2/20/95 4:00 p.m. and file stipulations of fact and law and evidentiary objections by 3/20/95 4:00 p.m.; exhibit list and witness list due 3/20/95 4:00 p.m.; trial set for 10:00 4/10/95 and continuing the next day thereafter; all prior Orders shall remain in full force and effect (N) (dbw) [Entry date 01/19/95]

2/3/95	47	JOINT MOTION by plaintiff BOSSIER PARISH, defendant JANET RENO, intervenor GEORGE PRICE to modify scheduling order; Attachment (ted) [Entry date 02/06/95]
2/3/95	48	JOINT MOTION by plaintiff BOSSIER PARISH, defendant JANET RENO, intervenor GEORGE PRICE to expedite ruling on defendants' motion to exclude testimony; Attachment (ted) [Entry date 02/06/95]
2/3/95	49	MOTION filed by defendant JANET RENO to exclude testimony; Attachment (ted) [Entry date 02/06/95]
2/14/95	50	RESPONSE (OPPOSITIONS) by plaintiff BOSSIER PARISH to Defendants and Intervenors' objections to testimony of complainant's witnesses, attachment (1) (lpp) [Entry date 02/15/95]
2/17/95	51	NOTICE OF FILING by intervenor GEORGE PRICE: Direct Tesdtimony [*sic*] of David Creed, letter (1) fiat 02/22/95 (lpp) [Entry date 02/23/95]
2/24/95	52	REPLY by defendant JANET RENO, intervenor GEORGE PRICE to response [50-1] by BOSSIER PARISH, Exhibits (4). (lpp) [Entry date 02/27/95]
3/17/95	53	EXHIBIT list by plaintiff Bossier Parish School Board (lpp) [Entry date 03/20/95]
3/17/95	54	WITNESS LIST by plaintiff BOSSIER PARISH (lpp) [Entry date 03/20/95]

3/17/95	63	DEPOSITION of Bob G. Burford taken by plaintiff BOSSIER PARISH, defendant JANET RENO, intervenor GEORGE PRICE on 10/12/94. (lpp) [Entry date 03/23/95]
3/20/95	55	EXHIBIT list by defendant-intervenors (lpp) [Entry date 03/21/95]
3/20/95	56	STIPULATION filed by Bossier Parish School Board, Plaintiff; Janet Reno, Defendant; George Price, Defendant-Intervenors et al. regarding Fact and Law. (N) (lpp) [Entry date 03/21/95] [Edit date 03/21/95]
3/20/95	57	NOTICE OF FILING by defendant JANET RENO: Final Versoion [*sic*] of Direct Testimony (lpp) [Entry date 03/21/95]
3/20/95	58	STIPULATION filed by Bossier Parish School Board, Plaintiff and Janet Reno, Defendant and George Price et al. Defendant-Intervenors, regarding: Exhibits. (N) (lpp) [Entry date 03/21/95]
3/20/95	59	MOTION filed by defendant JANET RENO to excude exhibit of plaintiff (lpp) [Entry date 03/21/95]
3/20/95	60	EXHIBIT list by Janet Reno, Defendant (lpp) [Entry date 03/21/95]
3/21/95	61	DEPOSITION of Paul Caplis taken by plaintiff BOSSIER PARISH, defendant JANET RENO, intervenor GEORGE PRICE on 10/13/94. (lpp) [Entry date 03/23/95]

3/21/95	62	DEPOSITION of James M. Bullers taken by plaintiff BOSSIER PARISH, defendant JANET RENO, intervenor GEORGE PRICE on 3/21/95. (lpp) [Entry date 03/23/95]
3/21/95	64	DEPOSITION of William Johnston taken by plaintiff BOSSIER PARISH, defendant JANET RENO, intervenor GEORGE PRICE on 10/12/94. (lpp) [Entry date 03/23/95]
3/21/95	65	JOINT STATEMENT OF OBJECTIONS by defendant JANET RENO, intervenor GEORGE PRICE to plaintiffs designation of deposition testimony of James Bullers [62-1] by GEORGE PRICE, JANET RENO, BOSSIER PARISH (dcn) [Entry date 03/23/95]
3/21/95	66	WITNESS LIST by defendant JANET RENO, intervenor GEORGE PRICE (dcn) [Entry date 03/23/95]
3/21/95	67	JOINT DESIGNATIONS OF PORTIONS OF DEPOSITION TESTIMONY of James Ramsey taken by plaintiff BOSSIER PARISH, defendant JANET RENO, intervenor GEORGE PRICE on 10/13/94. (dcn) [Entry date 03/23/95]
3/21/95	68	JOINT DESIGNATIONS OF PORTIONS OF DEPOSITION TESTIMONY of JAMES ELKINS taken by plaintiff BOSSIER PARISH, defendant JANET RENO, intervenor GEORGE PRICE on 10/12/94. (dcn) [Entry date 03/23/95]

3/22/95	69	JOINT STATEMENT OF OBJECTIONS by defendant JANET RENO, intervenor GEORGE PRICE to plaintiffs cross-designations of deposition testimony of school board members (dcn) [Entry date 03/23/95]
3/22/95	70	JOINT DESIGNATION OF PORTIONS OF DEPOSITION TESTIMONY of MARGUERITE HUDSON taken by plaintiff BOSSIER PARISH, defendant JANET RENO, intervenor GEORGE PRICE on 09/29/94. (dcn) [Entry date 03/23/95]
3/22/95	71	JOINT DESIGNATIONS OF PORTIONS OF DEPOSITION TESTIMONY of JUANITA JACKSON taken by plaintiff BOSSIER PARISH, defendant JANET RENO, intervenor GEORGE PRICE on 9/29/94. (dcn) [Entry date 03/23/95]
3/22/95	72	JOINT DESIGNATION OF PORTIONS OF DEPOSITION TESTIMONY of David Harvey taken by defendant JANET RENO, intervenor GEORGE PRICE on 9/30/94. (dcn) [Entry date 03/23/95]
3/22/95	73	JOINT DESIGNATION OF PORTIONS OF DEPOSITION TESTIMONY of BARBARA BAYLOCK taken by defendant JANET RENO, intervenor GEORGE PRICE on BARBARA BLAYLOCK. (dcn) [Entry date 03/23/95]

3/22/95	74	JOINT DESIGNATIONS OF PORTIONS OF DEPOSITION TESTIMONY of RUTH SULLIVAN taken by plaintiff BOSSIER PARISH, defendant JANET RENO, intervenor GEORGE PRICE on 9/29/95. (dcn) [Entry date 03/23/95]
3/22/95	75	JOINT DESIGNATION OF PORTIONS OF DEPOSITION TESTIMONY of BARBARA GRAY taken by plaintiff BOSSIER PARISH, defendant JANET RENO, intervenor GEORGE PRICE on BARBARA GRAY. (dcn) [Entry date 03/23/95]
3/22/95	76	JOINT DESIGNATIONS OF PORTIONS OF DEPOSITION TESTIMONY of SUSAN BARERRA taken by plaintiff BOSSIER PARISH, defendant JANET RENO, intervenor GEORGE PRICE on 9/30/95. (dcn) [Entry date 03/23/95]
3/22/95	77	JOINT DESIGNATIONS OF PORTIONS OF DEPOSITION TESTIMONY of BOYCE HENSLEY taken by plaintiff BOSSIER PARISH, defendant JANET RENO, intervenor GEORGE PRICE on 9/30/95. (dcn) [Entry date 03/23/95]
3/22/95	78	JOINT DESIGNATIONS OF PORTIONS OF DEPOSITION TESTIMONY of MICHELLE RODGERS taken by plaintiff BOSSIER PARISH, defendant JANET RENO, intervenor GEORGE PRICE on 9/30/95. (dcn) [Entry date 03/23/95]

3/22/95	79	JOINT DESIGNATIONS OF PORTIONS OF DEPOSITION TESTIMONY of HENRY BURNS taken by plaintiff BOSSIER PARISH, defendant JANET RENO, intervenor GEORGE PRICE on 10/6/94. (dcn) [Entry date 03/23/95]
3/29/95	80	MOTION filed by defendant JANET RENO the United States seeks permission to subpoena witnesses, attachment (a) (lpp) [Entry date 03/31/95]
4/3/95	81	ORDER by Judge Charles R. Richey: granting motion of the United States seeking permission to subpoena witnesses [80-1] by JANET RENO (N) (dbw)
4/3/95	82	MOTION filed by plaintiff BOSSIER PARISH to add additional counsel, Affidavit (1) (lpp) [Entry date 04/04/95]
4/4/95	85	MOTION filed by intervenor GEORGE PRICE seeking permission to subpoena witnesses (lpp) [Entry date 04/07/95]
4/6/95	83	ENTERED IN ERROR (lpp)
4/6/95	—	Tele-conference before Judge Charles R. Richey: bench trial remains set for 4/10/95 10:00 a.m. Reporter: Susan Tyner (dbw) [Entry date 04/07/95]
4/6/95	84	ORDER by Judge Charles R. Richey: authorizing Frank M. Ferrell to assist as additional attorney of record for complainant in prosecution of its cause in this court [82-1] (N) (dbw) [Entry date 04/07/95]

4/7/95	86	ORDER by Judge Charles R. Richey: granting motion seeking permission to subpoena witnesses [85-1] by GEORGE PRICE (N) (dbw)
4/7/95	88	AMENDED JOINT DESIGNATIONS of portions of deposition testimony of Ruth Sullivan; attachment. (jeb) [Entry date 04/11/95]
4/7/95	89	AMENDED JOINT DESIGNATIONS of portions of deposition testimony of Marquerite Hudson; attachment. (jeb) [Entry date 04/11/95]
4/7/95	90	AMENDED JOINT DESIGNATIONS of portions of deposition testimony of Michelle Rodgers; attachment. (jeb) [Entry date 04/11/95]
4/7/95	91	AMENDED JOINT DESIGNATIONS of portions of deposition testimony of Barbara Blaylock; attachment. (jeb) [Entry date 04/11/95]
4/7/95	92	EXHIBIT list of defendant United States. (jeb) [Entry date 04/11/95]
4/7/95	93	AMENDED JOINT DESIGNATIONS of portions of deposition testimony of David Harvey; attachment. (jeb) [Entry date 04/11/95]
4/7/95	94	NOTICE OF FILING of supplemented direct testimony of S.P. Davis; attachment. (jeb) [Entry date 04/11/95]
4/7/95	95	NOTICE OF FILING of corrected direct testimony of Dr. George Castille; attachment. (jeb) [Entry date 04/11/95]

4/7/95	96	NOTICE OF FILING (jeb) [Entry date 04/11/95]
4/7/95	97	AMENDED JOINT STATEMENT OF OBJECTIONS by defendant JANET RENO, intervenor-defendant GEORGE PRICE to plaintiff's cross-designations of deposition testimony of school board members. (jeb) [Entry date 04/11/95]
4/7/95	98	FINAL STIPULATIONS of fact and law. (jeb) [Entry date 04/11/95] [Edit date 04/11/95]
4/7/95	99	RESPONSE (OPPOSITIONS) by plaintiff BOSSIER PARISH to objection [97-1] by GEORGE PRICE, JANET RENO (lpp) [Entry date 04/12/95]
4/7/95	100	RESPONSE by plaintiff BOSSIER PARISH to motion to excude exhibit of plaintiff [59-1] by JANET RENO (lpp) [Entry date 04/12/95]
4/10/95	—	NON-JURY TRIAL before Judge Charles R. Richey begun and continued to 9:30 4/11/95. Reporter: Susan Tyner (dbw)
4/10/95	87	ORDER by Judge Charles R. Richey: directing counsel not to use word "expert", but instead shall refer to such persons as "opinion" witnesses during trial; Attachment (1) (N) (dbw) [Edit date 04/11/95]
4/11/95	—	NON-JURY TRIAL before Judge Charles R. Richey resumed and concluded; case [0-0] taken under advisement; proposed findings of fact due 5/3/95 4:00 p.m. Reporter: Susan Tyner (dbw) [Edit date 04/11/95]

4/12/95	101	ORDER by Judge Charles R. Richey: proposed findings of fact due 4/28/95; marked-up proposed findings of fact due by 4:00 5/5/95; advising parties that when the Court issues its findings of fact, a briefing and oral argument schedule shall be issued. (N) (dbw)
4/19/95	102	TRANSCRIPTS (2) filed for dates of 4/10/95; 4/11/95. Volumes I and II. Reporter: Susan Page Tyner (bm) [Entry date 04/21/95]
5/5/95	103	NOTICE OF FILING by defendant JANET RENO, intervenor-defendant GEORGE PRICE of marked-up proposed findings of fact and conclusions of law of plaintiff; attachment. (jeb) [Entry date 05/08/95]
5/5/95	104	NOTICE OF FILING by plaintiff BOSSIER PARISH of marked-up proposed findings of fact and conclusions of law of defendant and defendant-intervenor; attachment. (jeb) [Entry date 05/08/95]
5/15/95	105	ORDER by Judge Charles R. Richey: deferring ruling on the facts until after the Opinions are handed down in related cases before the U.S. Supreme Court; directing that on the tenth business day following the Supreme Court's issuance of its opinion in the related cases, counsel for all parties shall file simultaneous briefs on the law as a supplement to the factual supplements already filed; oral argument as to the facts of the law set for 9:30 7/19/95; (N) (jeb)

5/25/95	106	ORDER by Judge Charles R. Richey: setting oral argument as to the facts and the law for 9:30 a.m. 7/27/95 and continuing thereafter until 12:00 p.m. of the same day with the understanding that counsel for all parties shall meet and confer prior to argument to divide up the time among themselves in such manner as they deem fit (N) (dbw)
7/11/95	107	ORDER by Judge Charles R. Richey: reminding counsel, pursuant to Court's Order of 5/15/95, they are [to] file final briefs with respect to further issues herein and the two Supreme Court Opinions entitled US v. Hays and Miller v. Johnson by 4:00 on 7/14/95; directing Clerk of Court to telephone contents of this Order to Counsel for all parties (N) (dbw)
7/12/95	108	SUPPLEMENTAL BRIEF by plaintiff BOSSIER PARISH; attachment (post-trial brief); exhibits (4) (No signature on pleading). (jmf) [Entry date 07/13/95] [Edit date 07/13/95]
7/14/95	109	POST TRIAL BRIEF by defendant JANET RENO (BULKY PLEADING) (jmf) [Entry date 07/18/95]
7/14/95	110	POST TRIAL BRIEF by intervenor-defendant GEORGE PRICE (jmf) [Entry date 07/18/95]
7/24/95	111	NOTICE OF FILING by defendant JANET RENO of unreported decision and errata to post-trial brief; Attachments (2) (ted) [Entry date 07/25/95]

7/27/95	—	ORAL ARGUMENT held before Circuit Judge Laurence Silberman, Judge Charles R. Richey, and Judge Gladys Kessler. Reporter: Susan Tyner (dbw)
8/23/95	112	TRANSCRIPT filed for Oral Argument held on date(s) of July 27, 1995. Reporter: Susan Page Tyner (jmf)
11/2/95	113	MEMORANDUM OPINION FOR THE COURT by Judge Laurence H. Silberman and Judge Charles R. Richey granting plaintiff Bossier Parish School Board the requested declaratory judgment (N); APPENDIX (2) (dbw) [Entry date 11/03/95]
11/2/95	114	MEMORANDUM OPINION by Judge Gladys Kessler concurring in part and dissenting in part (N) (dbw) [Entry date 11/03/95]
11/2/95	115	ORDER by Judge Laurence H. Silberman and Judge Charles R. Richey: plaintiff Bossier Parish School Board shall be, and hereby is, given preclearance for its election plan adopted on October 1, 1992, and shall have a declaratory judgment to that effect (N) (dbw) [Entry date 11/03/95]

12/27/95 116 (ENTERED IN ERROR) NOTICE OF APPEAL by defendant JANET RENO from order plaintiff Bossier Parish School Board shall be, and hereby is, given preclearance for its election plan adopted on October 1, 1992, and shall have a declaratory judgment to that effect [115-1], order [115-2], entered on: November 03, 1995. No fee paid U.S. Gov't; Copies mailed to James J. Thornton, Nancy Sardeson, Gaye L. Hume, Patricia A. Brannan and Samuel L. Walters. (jmf) [Entry date 12/28/95] [Edit date 01/30/96]

12/27/95 119 NOTICE OF APPEAL by defendant JANET RENO to the U.S. Supreme Court from order plaintiff Bossier Parish School Board shall be, and hereby is, given preclearance for its election plan adopted on October 1, 1992, and shall have a declaratory judgment to that effect [115-1], order [115-2], entered on: November 03, 1995. (jmf) [Entry date 01/30/96]

12/28/95 — TRANSMITTED PRELIMINARY RECORD on appeal [116-1] by JANET RENO to U.S. Court of Appeals (jmf)

1/2/96 117 NOTICE OF FILING by defendant JANET RENO of clarification on service of previously filed notice of appeal. (jmf) [Entry date 01/03/96]

1/2/96	118	NOTICE OF APPEAL by intervenor-defendants' to the U.S. Supreme Court from order plaintiff Bossier Parish School Board shall be, and hereby is, given pre-clearance for its election plan adopted on October 1, 1992, and shall have a declaratory judgment to that effect [115-1], entered on: $5.00 filing fee paid. November 03, 1995. (jmf) [Entry date 01/03/96]
3/1/96	120	LETTER received from Supreme Court of the U.S. that the application for extension of time within which to docket an appeal has been granted to and including March 11, 1996 (jmf) [Entry date 03/06/96]
3/4/96	121	LETTER from the Supreme Court of the U.S. that the application for an extension within which to docket an appeal has been granted to and including March 18, 1996. (jmf) [Entry date 03/06/96]

[DOJ letterhead omitted]

May 31, 1990

Ms. Cheryl G. Martin
Secretary-Treasurer
Bossier Parish Police Jury
P. O. Box 68
Benton, Louisiana 71006

Dear Ms. Martin:

This refers to Ordinance No. 3101 (1989) which provides for realignment of voting precincts for Bossier Parish, Louisiana, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your submission on April 2, 1990.

The Attorney General does not interpose any objection to the change in question. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such change. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41).

Sincerely,

John R. Dunne
Assistant Attorney Ceneral
Civil Rights Division

/s/ BARRY H. WEINBERG
By: BARRY H. WEINBERG
Acting Chief, Voting Section

[DOJ letterhead omitted]

July 29, 1991

Mr. James W. Ramsey
Bossier Parish Police Jury
P. 0. Box 68
Benton, Louisiana 71006

Dear Mr. Ramsey:

This refers to the 1991 redistricting plan for the police jury, the precinct realignment, twelve polling place changes, and the creation of seventeen new voting precincts and the polling places therefor for Bossier Parish, Louisiana, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your initial submission on May 28, 1991; supplemental information was received on July 19, 1991.

The Attorney General does not interpose any objection to the specified changes. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes. In addition, as authorized by Section 5, we reserve the right to reexamine this submission if additional information that would otherwise require an objection comes to our attention during the remainder of the sixty-day review period. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41 and 51.43).

Sincerely,

John R. Dunne
Assistant Attorney General
Civil Rights Division

/s/ GERALD W. JONES
By: GERALD W. JONES
Chief, Voting Section

[Extract of minutes of Bossier Parrish Police Jury Meeting 1/11/94, P. Exh. 5]

Mr. Avery stated that he has spoken to Mr. Gary Joiner regarding the current issue of the Bossier Parish School Board's struggle for approval of its reapportionment plan by the Justice Department. The school board has submitted the same plan which the Justice Department approved for the police jury two years ago, but has been denied approval. Motion was made by Mr. Meachum, seconded by Mr. Glorioso, that the Bossier Parish Police Jury clarify that it stands by its original reapportionment plan. Mr. Darby stated that he is concerned that if the school board and the police jury have different district lines, it will be confusing to Bossier Parish citizens. However, Mr. Darby indicated that he supports the police jury's original plan. Mr. Bullers, District Attorney, stated that he does not understand the position of the Justice Department and that he feels the school board will ultimately end up in court with a judge making the final decision. Votes were cast on Mr. Meachum's motion to make public the police jury's intention to maintain its current district lines. Motion carried unanimously.

This is to certify that this a true and correct copy of an extract of the minutes of the Bossier Parish Police Jury Meeting held in the Bossier Parish Courthouse in Benton, La. on the 11 day of Jan., 1994. Given under my hand and seal of the Bossler Parish Policy Jury on the 7 day of Feb., 1995.

/s/ CHERYL G. MARTIN
Secretary-Treasurer

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

Civil Action
Number 94-848-A2

Honorable John V. Parker
August 23, 1994

REVEREND JESSE CARROLL KNIGHT, SR., ET AL.,
PLAINTIFF
v.
W. FOX MCKEITHEN, ET AL., DEFENDANTS

COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

Appearances

For the Plaintiff:

Ms. Patricia A. Brannan
Attorney at Law

Mr. John W. Borkowski
Attorney at Law

Mr. Samuel L. Walters
Attorney at Law

For the East Carroll Parish School Board:

Mr. Michael Lancaster
Attorney at Law

Mr. James D. Caldwell
Attorney at Law

For the St. Mary Parish School Board:

Mr. James McClelland
Attorney at Law

For the Bossier Parish School Board:

Mr. James Thornton
Attorney at Law

Mr. Frank M. Ferrell
Attorney at Law

For the Secretary of State:

Ms. Sheri Morris
Attorney at Law

For Richard Ieyoub:

Ms. Angie Laplace
Attorney at Law

For the United States:

Ms. Nancy Sardeson
Attorney at Law

Reported by: Kay Raborn, C.C.R.
Official Court Reporter

THE COURT: All right, this will be the court's findings of fact and conclusions of law, at least to the extent that we can put something together, subject, of course, to further additional findings and conclusions should that become appropriate.

This matter is before the court on a motion for preliminary injunction filed on behalf of the plaintiffs, who are alleged to be black citizens and registered voters of East Carroll and Bossier parishes, insofar as is currently material. And there is, of course, no evidence to the contrary.

They allege that the school boards are threatening to deprive the plaintiffs of their right to participate equally in public school board elections conducted under lawful non-discriminatory redistricting plans pursuant to the schedule prescribed by state law for the conduct of such elections in violation of the 14th and 15th Amendments, Sections 2 and 5 of the Voting Rights Act for 1965 and 42 U.S.C. Section 1983.

It is undisputed that both East Carroll and Bossier parishes have not adopted and placed into effect redistricting plans for the school board. I said East Carroll and Bossier parishes. I mean, East Carroll and Bossier parishes school boards have not adopted and set into effect redistricting plans for those respective boards, as they are required to do, both by the state law and, of course, by federal law.

Accordingly, the thrust of this litigation has to be to take appropriate steps since it is undisputed that there is a violation of law to take appropriate steps to remedy the violation. I repeat, for purposes of clarity, that the only violation is the one-man-one-vote principle.

There are alleged violations of Section 2 of the Voting Rights Act, but that is not relevant to any issue presently before the court. The only relevance to Section 2 is that in ordering a reapportionment redistricting, the court, the board, or anybody else attempting to draw a plan, must comply with all measures of law, including Section 2 of the Voting Rights Act.

In addition, if this court starts drawing any plans, the court should comply or the plan adopted by the court, ordered by the court, should comply, in every possible respect, with all portions of state law, which are not contradictory to federal law. It is, I think, pretty clearly established that district courts do have power to fashion interim remedies and to order interim plans into effect where necessary, whether there is any violation of federal law, including a violation of the one-man-one-vote principle.

Elections, of course, are presently scheduled according to the State's regular timetable, throughout the State for school boards, and we have stipulated that if this court orders interim plans into effect, that qualification to run for office under that plan would be tomorrow, August 24th, and the next day, August 25th, as I recall.

Was it two, or three days, Ms. Morris?

MS. MORRIS: Three

THE COURT: Consequently, there is a great need for haste.

Now, in compliance with Section 2 of the Voting Rights Act, that provision reads, in part, a violation of subsection A is established, if based on the totality of circumstances, as is shown, that the political processes leading to nomination or election in the State or political subdivision are not equally open to partcipation by

members of a class of citizens protected by subsection (a) of this section, in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. So, that is the goal that we must have in mind when we seek to reapportion the school board.

The plaintiffs have presented a plan, which they say will fully comply, not only with one-man-one-vote, but will fully meet every expectation and requirement of Section 2 of the Voting Rights Act. And I again emphasize that we do not here have any proven violation of Section 2 of the Voting Rights Act. We have a claim by the plaintiffs that District 3 of the plan presented by the defendants does not, in my words, present an equal playing field so that members of the minority do have an opportunity, with other members of the electorate, to participate in the political process and to elect representatives of their choice.

Counsel for the plaintiffs started her oral argument a few moments ago by emphasizing how closely these plans resemble each other. And that seems, to the court, to certainly be correct. If my arithmetic is straight, that is correct. The plaintiffs would add fifty-six black people of voting age to that district and would zone out ninety-two white people of voting age in that district, which would cause the black voting age population to go up from 436 to 492 and the white voting age population to go down from 239 to 147, and would make a tremendous difference in the percentage.

The district, at present, as drawn by the defendants and presented to the Department of Justice, has a voting age black population of 64.6 percent, and under the plaintiffs' suggestion, these small numbers would produce an increase in black voting age population of seventy-seven percent, some thirteen percent increase,

which illustrates that when you're dealing with small numbers, large percentages can result.

There is very little difference between these plans. The testimony of Dr. Weber has convinced me that the district, as drawn, presents a level playing filed for voters of both races.

Section 2 specifically provides nothing in this section establishing a right to have members of a protected class elected in numbers equal to their proportion in the population.

I think the plan drawn by the plaintiffs is what they call, in this type of litigation, packing. The evidence does not convince the court that there is any necessity for packing in this district. The analysis of Dr. Weber of these police jury elections in this same district—well, there are two of them; one in the other District, 3, and one in District 5, where black police jury candidates were not able to win, illustrates to me that had the black population wanted to vote for the black candidate who lost, the black candidate would have won.

In other words, the opportunity, in the words of Section 2, the opportunity is there. By reason of the sixty-five percent black voting age population, this court has no reason to believe that this district is not equally open to participation by members of a class of citizens protected by subsection (a).

In other words, it doesn't seem to me that this geographic drawing is likely to produce a violation of Section 2 of the Voting Rights Act, despite what the Department of Justice may have said. The Department of Justice has to do its thing and the court will have to do its thing, based upon the evidence presented in court.

Since I'm not convinced that there is a need for packing, as the plaintiffs propose, I'm not willing to order the plan presented by the plaintiffs into effect as an interim plan for use in this school board election.

It is highly desirable, however, that there be elections—an election for school board in East Carroll parish. To allow the entire parish to be deprived of the right to vote for members of the school board, because of this small disagreement—well, it's not a small disagreement. It's a very serious disagreement between the plaintiffs and the school board. But a disagreement over this small number of people, to deprive all 9,709 people of the parish the opportunity to vote seems, to me, to be ridiculous.

Under the circumstances, the court exercises its discretion in ordering plan number 6, or whatever you call it, which has been objected to by the Attorney General, in effect for the coming election for school board in East Carroll parish, with the proviso that this will truly be an interim remedy.

This plan and the terms of office of those elected, shall be limited until the next round of elections in the spring of 1995. As I recall, a representative of the secretary of state's office says that's the next time you can have an election in Louisiana.

Is that correct, Ms. Morris?

MS. MORRIS: That's correct.

THE COURT: Whenever those dates are.

MS. MORRIS: April 1st and 29th.

THE COURT: I can't hear you.

MS. MORRIS: They're April 1st and April 29th.

THE COURT: That's the date of the elections?

MS. MORRIS: Yes.

THE COURT: Okay. Well, this is August 23rd. By that time, East Carroll Parish should have in effect a permanent plan which, of course, must be approved by the Department of Justice under Section 5 of the Voting Rights Act.

I don't care what plan is approved. I say approved. They just have no objection. It's not technically unapproved. Perhaps you can work with these plaintiffs and come up with something that the Department of Justice can approve, all the while bearing in mind that you don't want to split precincts or otherwise fail to comply fully with Louisiana law unless it's absolutely necesary to do so.

Whatever the plan is must be resubmitted to the court well in advance. Or, if you want to again submit competing plans, that will be all right, too, because this is only on a motion for preliminary injunction and the merits of the case have yet to be reached. I think perhaps you were wise, counsel, in suggesting that we not advance trial of the merits, as the court suggested the other day. If necessary, the court will fix a time by which you need to resubmit that plan, but right now, I'm not going to do it. I think we're too uncertain as to what the time might be.

As far as I know, that takes care of the business with East Carroll.

There remains on the table the school board of Bossier Parish. Bossier has submitted a plan to the Department of Justice, to which objection has been taken and Bossier has filed suit in the United States District Court for the District of Columbia.

Let me back up one minute. I don't find that the East

Carroll Parish school board has been deliberately dragging its collective feet in an attempt to be dilatory or not reapportion. And there is no evidence before the court that any of what went into their plan is deliberately intentionally racially motivated or intended to dilute black voting strength or otherwise to attempt to penalize or disenfranchise members of the minority.

I think the East Carroll school board, as has been pointed out, is one of the poorest places in the—the parish is one of the poorest places in the United States, and I think the board has attempted to get a redistricting plan in as economical a fashion as possible. And that's one of the reaons they wanted to do it the same way the police jury did. Because they didn't have to hire some high-priced expert to draw them a plan, if they just adopted the police jury plan. And when the Department of Justice offered no objection to the police jury plan, that certainly encouraged them to think that if it's sauce for the goose, it ought to be sauce for the gander. Of course, as it turns out, they were wrong.

Now, back to Bossier. Bossier has submitted the plan to which the Department of Justice has made an objection, and a suit has been filed in the District of Columbia. The Bossier school board had moved for a stay of these proceedings pending the outcome of that proceeding. I don't know whether I formally ruled on that, but if I haven't, that motion for the stay is denied. Obviously, we have proceeded and did proceed.

The situation in Bossier is similar to the situation in East Carroll in that the plan submitted by the Bossier schooi board to the Department of Justice is identical to that which was submitted by the Bossier police jury to the Department of Justice, to which no objection was made by the Department.

There is perhaps some evidence of some delay on the part of Bossier Parish since the Department of Justice approved the Bossier police jury plan long ago. I've forgotten just how long ago. And there was some time lag between that approval and submission of the school board plan. But I don't find there is any real evidence on the part of Bossier deliberately perpetuating themselves in office, although, that is, of course, the effect of not having approval from the Department of Justice, because of state law, which provides that they shall remain in office until their successors are qualified.

The plaintiffs have proposed an interim plan for Bossier, and, frankly, that plan offends the court because it most nearly resembles an octopus as it stretches out to the nooks and crannies of the parish in order to collect enough black voting age population to create not one, but two, majority black districts in Bossier. The percentage of black voting age population in Bossier Parish, according to the information submitted to me is 17.7 percent and 20.2 percent of the total parish population.

I'm not comfortable with the plan presented by the plaintiffs. I have not had sufficient time or sufficient evidence presented to convince me that some other plan, which complies with Section 2 of the Voting Rights Act, cannot be drawn that will recognize compactness and will not zig-zag all over the parish.

This court is still of the opinion that other principles of drawing election districts still apply, such as natural boundaries and historical boundaries, recognition of city limits, recognition of common interest of a population, and compactness. The plaintiffs' plan doesn't do that.

I don't have any evidence about the plan submitted by the Bossier school board, other than their lawyer, Mr.

Thornton, says it's fine. Under those circumstances, I cannot order the plaintiffs' plan into effect as an interim plan, and I don't have sufficient information about the defendant's plan to feel comfortable ordering it into effect. Under those circumstances, I will decline to order any plan into effect at this time.

If that seems rather odd, if it's important to have an election in East Carroll, why isn't it important to have an election in Bossier? Well, it is. But due to the haste of these proceedings, the election being scheduled so quickly, the court simply is not satisfied with any plan which has been presented to it, nor do I have sufficient information to feel comfortable in attempting to devise a plan of my own.

However, between now and the time we take the mattter up on the merits, I would expect that additional plans be proposed. I don't think you can get two majority black districts in the parish of Bossier without gerrymandering the districts. So, I would expect between now and the trial of this case on the merits both sides may well want to submit additional plans. And before the scheduled time for elections, in the spring of next year, we'll have a plan from the court, or Bossier school board will have a no objection blessing from the District Court in the District of Columbia.

Let me rephrase that so that everybody understands what I'm saying. We're going to have a plan for elections next spring, whether this court does it or the court in the District of Columbia does it. So, at this time the court declines to issue any injunction relative to the parish of Bossier.

If I need to, I'll make supplemental findings and conclusions.

I can't think of anything I haven't covered. If I've omitted something, somebody sound off. We only have these two left, don't we?

All right, court will be in recess. (Court recessed at 3:30 p.m.)

CERTIFICATE

I, the undersigned, do hereby certify that the above and foregoing is a true and correct transcription, to the best of my ability and understanding, of the official record of the proceedings.

/s/ KAY RABORN, C.C.R.

KAY RABORN, C.C.R.

Excerpts from Plaintiff's Exhibit 17 (Direct Testimony of Gary Dillard Joiner)

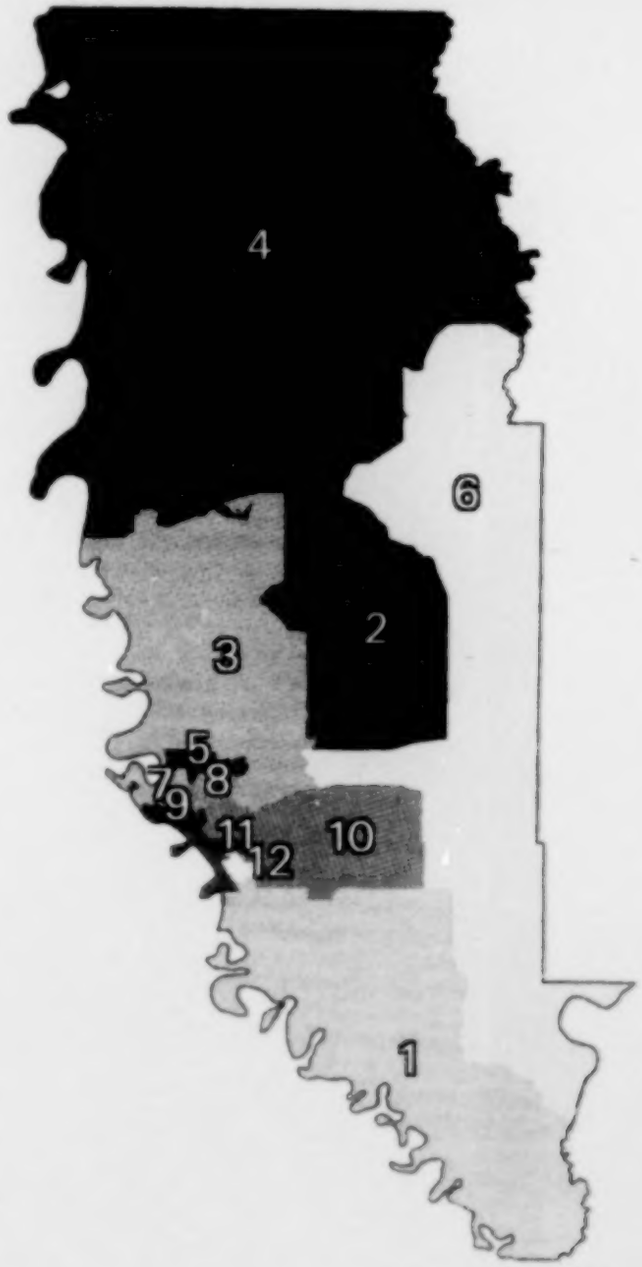
* * * *

[5]

I would like to explain the enormity of the problem faced by the members of the Bossier Parish School Board in attempting to create black majority districts in Bossier Parish. As I have previously mentioned, it was illegal for the members of the school board to cut or split existing precincts. The only possible way to create black majority districts is on a census block level as opposed to a precinct level. But since that can't be done, you have to look at making precinct cuts. When I attempted to create a black majority district within Bossier City the lowest number of cuts that I made was approximately fourteen (14). These precinct violations would have created fourteen new precincts inside Bossier City, primarily along the river. When I attempted then to add another black majority district to the north, the lowest combination of the two districts that I could come up with was something in the neighborhood of fifty-eight or sixty cuts. When I studied the original plan submitted by the NAACP which created two black majority districts, their plan had one hundred and sixty-two cuts. Each cut, and the creation of a new precinct requires a separate voting machine and a separate set of voting commissioners. This creates a serious additional cost factor for the voters of Bossier Parish, not to mention the confusion of the voter. To make matters worse for the members of the Bossier Parish School Board was the fact that Mr. James Bullers, the District Attorney of Bossier Parish and their legal counsel, advised them that they could not adopt a plan that cut or created new precincts.

BOSSIER PARISH, LA

Current School Board



Library: Bossier Parish, LA

Plan: CURRENTSCHOOLBD

DISTRICTS

1
2
3
4
5
6
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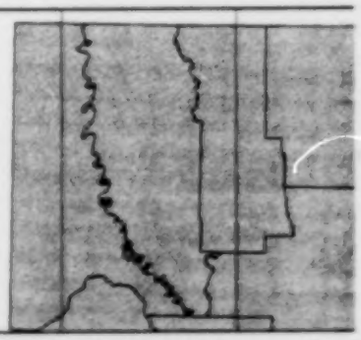
11
12

County Boundaries



Scale in Miles

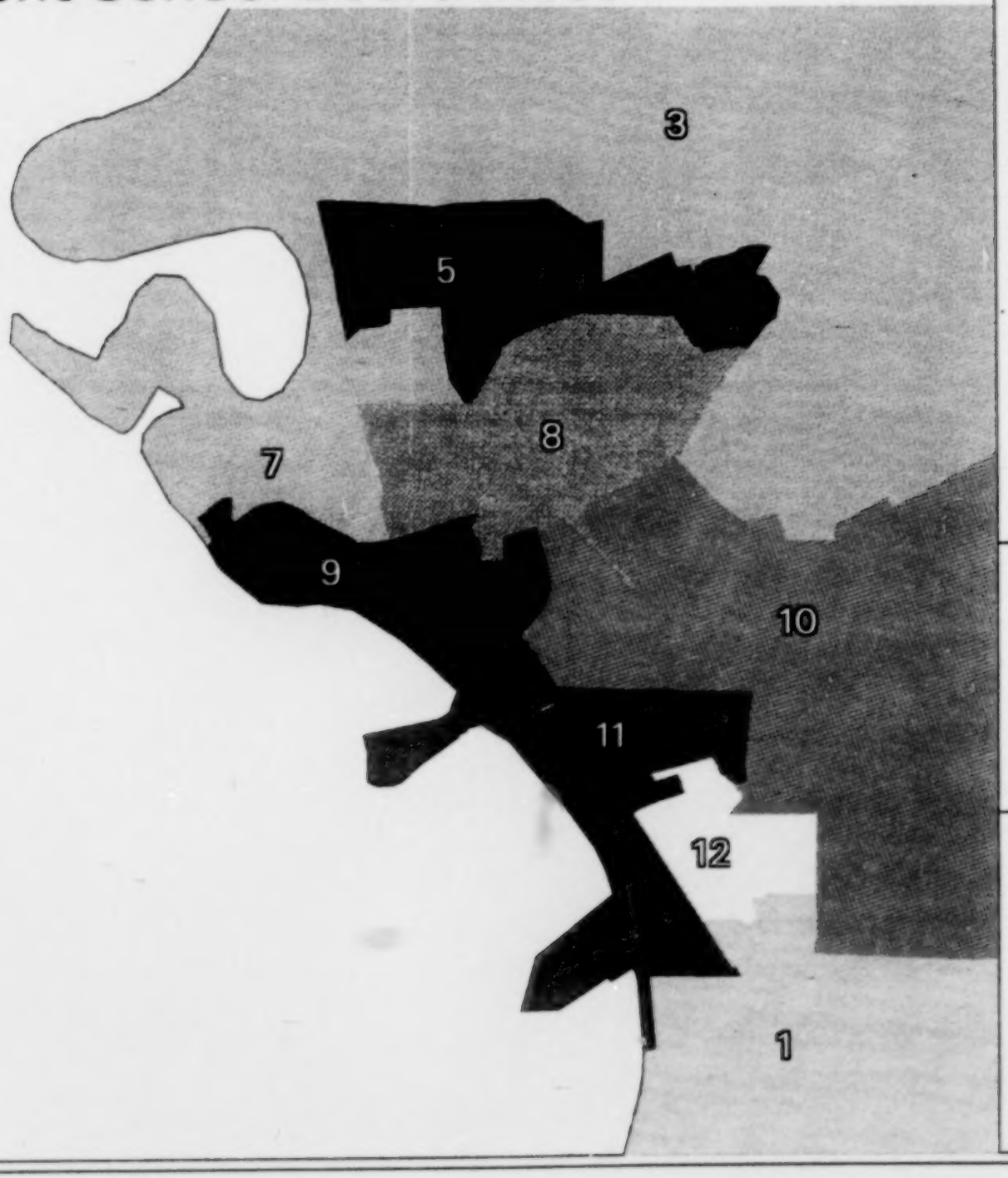
0 1 2 4 6

Prepared by:
United States Department of Justice
Washington, D.C., 20530

July 24, 1996

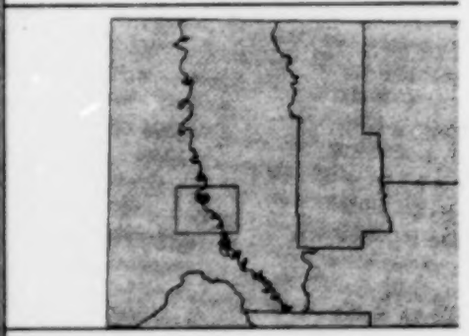
BOSSIER PARISH, LA

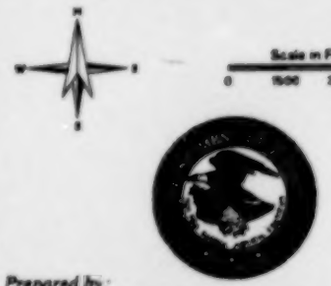
Current School Board Inset



Library: Bossier Parish, LA

Plan: CURRENTSCHOOLBD





Prepared by:
United States Department of Justice
Washington, D.C., 20530

July 24, 1996

CURRENT SCHOOL BOARD PLAN

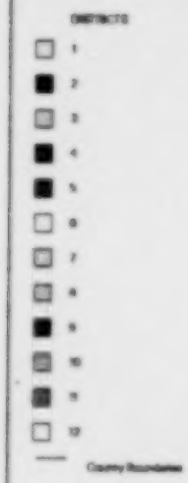
DIST.	TOTAL POP	TOTAL NON-HISPANIC WHITE	TOTAL NON-HISPANIC WHITE %	VOTING AGE NON-HISPANIC WHITE	VOTING AGE NON-HISPANIC WHITE %	TOTAL NON-HISPANIC BLACK	TOTAL NON-HISPANIC BLACK%	VOTING AGE NON-HISPANIC BLACK	VOTING AGE NON-HISPANIC BLACK%	TOTAL OTHER	TOTAL OTHER%	VOTING AGE OTHER	VOTING AGE OTHER %
1	9,233	7,667	83.0	5,312	84.3	1,225	13.3	759	12.0	341	3.7	233	3.7
2	7,889	6,446	81.7	4,457	83.1	1,289	16.3	803	15.0	154	2.0	105	2.0
3	13,598	11,764	86.5	8,347	87.2	1,490	11.0	998	10.4	344	2.5	232	2.4
4	6,552	3,431	52.4	2,614	56.7	3,044	46.5	1,941	42.1	77	1.2	53	1.2
5	6,498	5,313	81.8	3,937	85.3	956	14.7	507	11.0	229	3.5	172	3.7
6	7,963	6,253	78.5	4,553	79.9	1,579	19.8	1,059	18.6	131	1.6	89	1.6
7	5,867	3,156	53.8	2,458	60.5	2,559	43.6	1,500	36.9	152	2.6	103	2.5
8	6,516	4,987	76.5	3,854	80.0	1,140	17.5	692	14.4	389	6.0	272	5.6
9	6,229	4,610	74.0	3,612	79.3	1,364	21.9	759	16.7	255	4.1	184	4.0
10	6,054	3,867	63.9	2,757	65.6	1,811	29.9	1,192	28.4	376	6.2	251	6.0
11	4,085	3,428	83.9	2,630	86.9	458	11.2	257	8.5	199	4.9	141	4.7
12	5,604	4,890	87.3	3,599	88.4	386	6.9	259	6.4	328	5.9	213	5.2

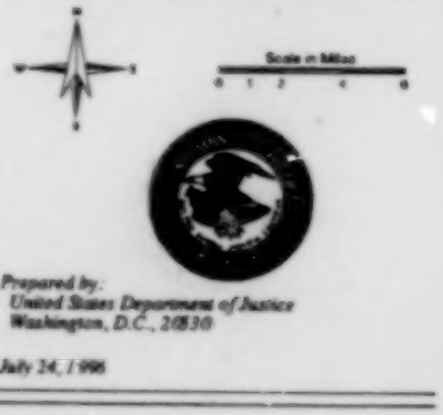
BOSSIER PARISH, LA

Proposed School Board

Library: Bossier Parish, LA

Plan: PROPOSEDSCHOOLBD





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BOSSIER PARISH, LA

Proposed School Board Inset

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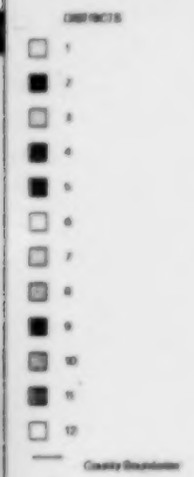
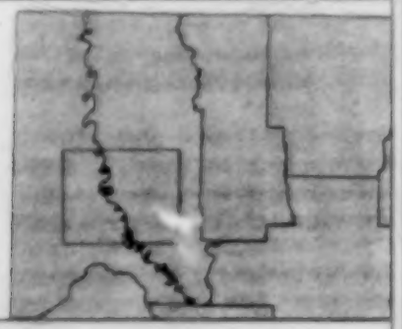
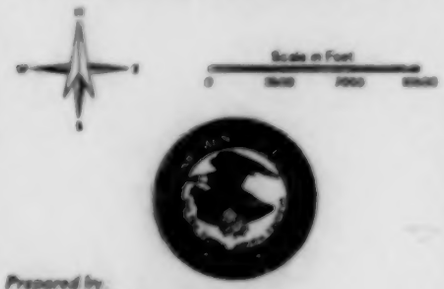
Plan: PROPOSEDSCHOOLBD







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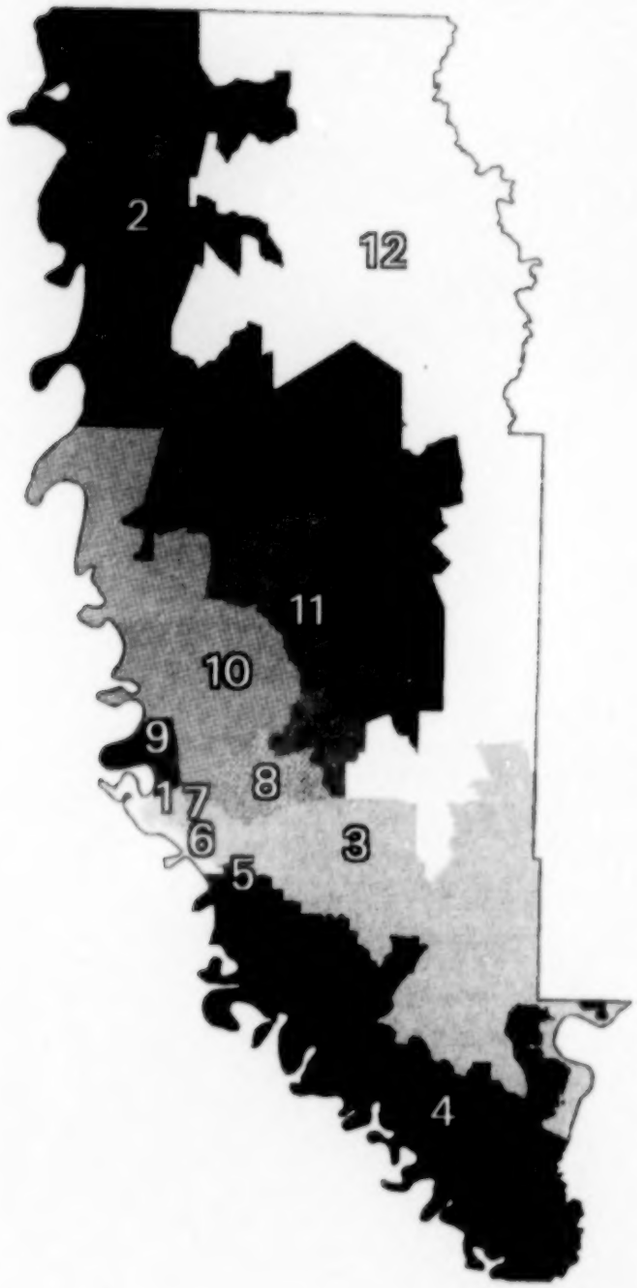
July 24, 1998

PROPOSED SCHOOL BOARD PLAN

DIST.	TOTAL POP	TOTAL NON-HISPANIC WHITE	WHITE %	VOTING AGE NON-HISPANIC WHITE	WHITE %	TOTAL NON-HISPANIC BLACK	BLACK %	VOTING AGE NON-HISPANIC BLACK	BLACK %	TOTAL OTHER	OTHER %	VOTING AGE OTHER	OTHER %
1	7,187	5,020	69.9	3,626	71.6	2,069	28.8	1,365	27.0	98	1.4	71	1.4
2	7,521	6,542	87.0	4,555	88.1	818	10.9	500	9.7	161	2.2	114	2.2
3	6,764	4,999	73.9	3,623	75.7	1,636	24.2	1,074	22.5	129	1.9	87	1.8
4	6,903	3,716	53.8	2,817	58.0	3,109	45.0	1,990	40.9	78	1.1	54	1.1
5	7,607	6,615	87.0	4,581	88.1	730	9.6	445	8.6	262	3.4	175	3.4
6	7,444	7,000	94.0	5,169	94.3	272	3.7	189	3.5	172	2.3	126	2.3
7	6,992	3,732	53.4	2,977	61.0	3,058	43.7	1,763	36.1	202	2.9	138	2.8
8	6,899	5,058	73.3	3,793	77.6	1,457	21.1	831	17.0	384	5.6	265	5.4
9	7,219	5,853	81.1	4,578	84.8	1,073	14.9	609	11.3	293	4.1	215	4.0
10	7,452	4,988	66.9	3,594	69.2	1,989	26.7	1,277	24.6	475	6.4	323	6.2
11	7,019	6,134	87.4	4,534	88.7	499	7.1	322	6.3	386	5.5	254	5.0
12	7,081	6,155	86.9	4,283	88.0	591	8.4	361	7.4	335	4.7	226	4.6

BOSSIER PARISH, LA

NAACP



Library: Bossier Parish, LA

Plan: NAACP

DISTRICTS

1
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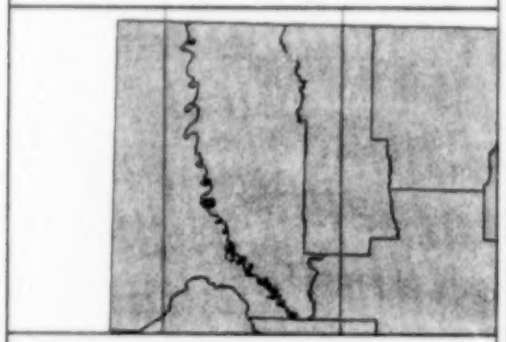
County Boundaries



Scale in Miles

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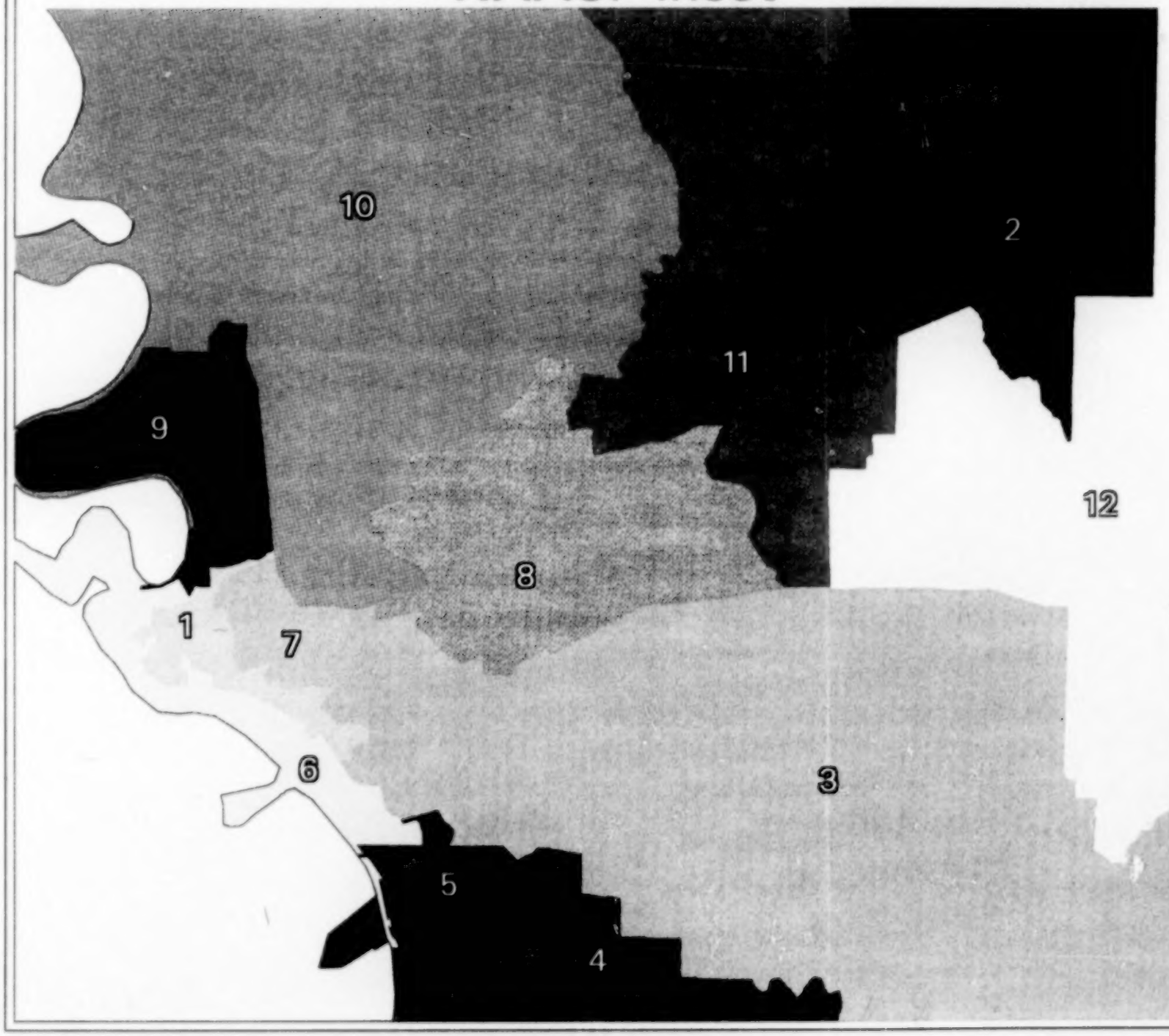
BOSSIER PARISH, LA

NAACP Inset



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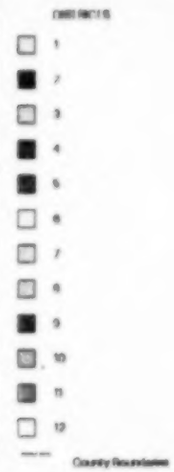

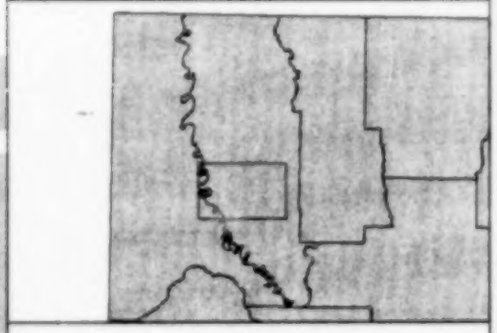

Scale in Feet

0 2500 5000 7500

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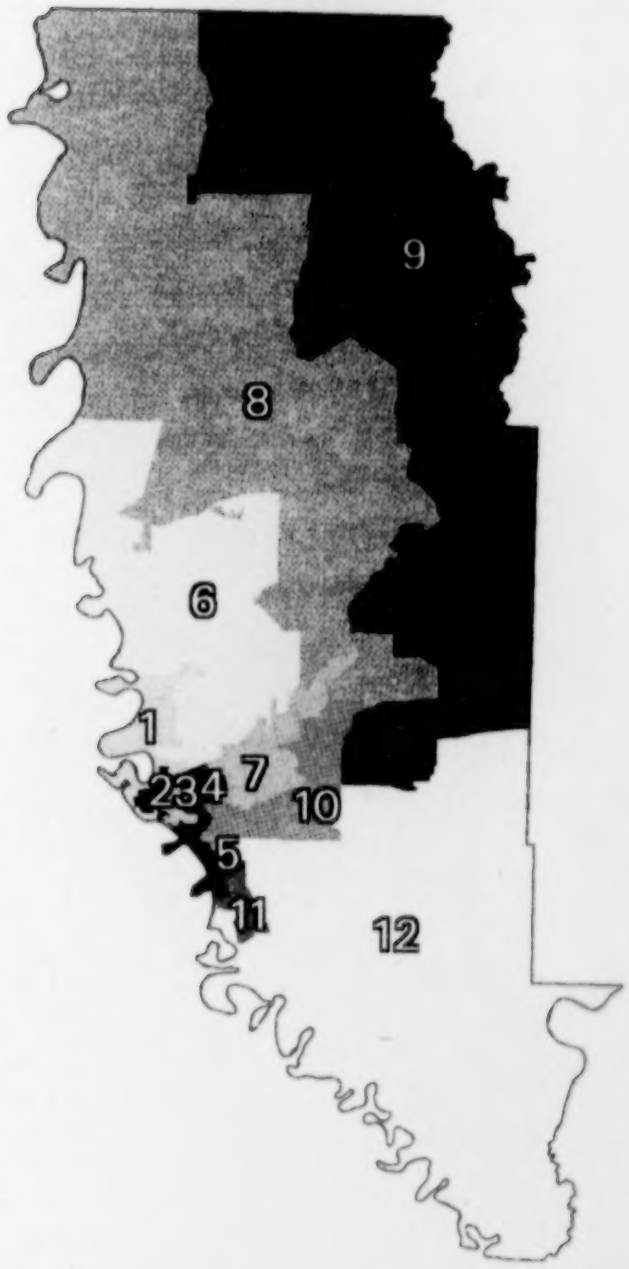
June 28, 1996

NAACP PLAN

DIST.	TOTAL POP	TOTAL NON-HISPANIC WHITE	WHITE %	VOTING AGE NON-HISPANIC WHITE	WHITE %	TOTAL NON-HISPANIC BLACK	BLACK %	VOTING AGE NON-HISPANIC BLACK	BLACK %	TOTAL OTHER	OTHER %	VOTING AGE OTHER	OTHER %
1	6,874	2,792	40.6	2,198	46.6	3,908	56.9	2,394	50.7	174	2.5	129	2.7
2	6,875	2,487	36.2	1,834	39.6	4,311	62.7	2,737	59.1	77	1.1	63	1.4
3	6,886	3,931	57.1	2,734	58.6	2,595	37.7	1,696	36.4	360	5.2	234	5.0
4	7,289	6,357	87.2	4,455	88.1	645	8.9	408	8.1	287	3.9	196	3.9
5	7,002	6,107	87.2	4,472	88.6	522	7.5	335	6.6	373	5.3	242	4.8
6	7,188	5,878	81.8	4,567	85.8	1000	13.9	540	10.1	310	4.3	218	4.1
7	6,823	5,966	87.4	4,716	89.4	555	8.1	337	6.4	302	4.4	223	4.2
8	7,457	6,167	82.7	4,278	84.8	950	12.7	539	10.7	340	4.6	227	4.5
9	7,427	6,676	89.9	4,942	91.9	584	7.9	309	5.8	167	2.3	126	2.3
10	7,414	6,011	81.1	4,435	83.3	1,116	15.1	702	13.2	287	3.9	187	3.5
11	7,395	6,700	90.6	4,581	91.2	514	7.0	324	6.5	181	2.5	121	2.4
12	7,458	6,740	90.4	4,918	91.0	601	8.1	405	7.5	117	1.6	82	1.5

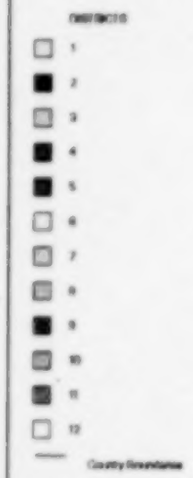
BOSSIER PARISH, LA

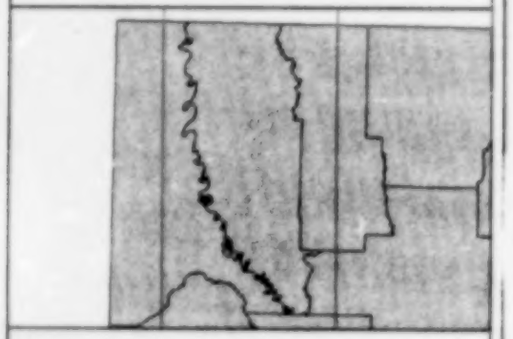
Cooper

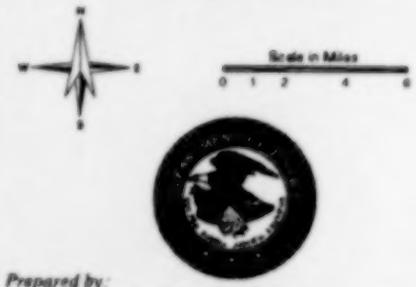


Library: Bossier Parish, LA

Plan: COOPER







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BOSSIER PARISH, LA

Cooper Inset

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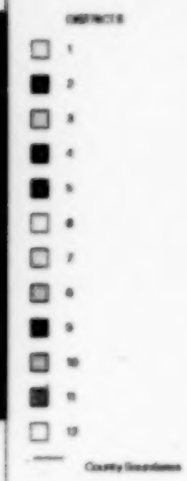
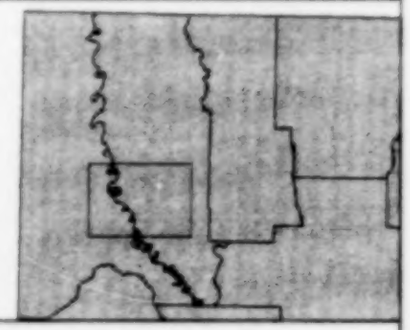
Plan: COOPER





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June 28, 1996

COOPER PLAN

DIST.	TOTAL POP	TOTAL NON-HISPANIC WHITE	TOTAL NON-HISPANIC WHITE%	VOTING AGE NON-HISPANIC WHITE	VOTING AGE NON-HISPANIC WHITE%	TOTAL NON-HISPANIC BLACK	TOTAL NON-HISPANIC BLACK%	VOTING AGE NON-HISPANIC BLACK	VOTING AGE NON-HISPANIC BLACK%	TOTAL OTHER	TOTAL OTHER%	VOTING AGE OTHER	VOTING AGE OTHER%
1	6,840	6,271	92.0	4,603	92.8	393	5.8	235	4.7	176	2.6	125	2.6
2	6,840	2,543	37.2	1,975	43.8	4,135	60.5	2,427	53.8	162	2.4	106	2.4
3	7,057	5,756	81.6	4,574	84.7	1,021	14.5	622	11.5	280	4.0	207	3.8
4	7,043	5,409	76.8	4,031	80.4	1,223	17.4	692	13.8	411	5.8	294	5.9
5	7,475	6,524	87.3	4,937	88.7	548	7.3	359	6.5	403	5.4	271	4.9
6	6,886	6,267	91.0	4,702	91.4	454	6.6	327	6.4	165	2.4	114	2.2
7	7,473	6,391	85.5	4,382	86.9	792	10.6	468	9.3	290	3.9	196	3.9
8	6,839	2,750	40.2	2,010	43.6	4,012	58.7	2,543	55.2	77	1.1	59	1.3
9	7,496	6,448	86.0	4,681	87.2	927	12.4	604	11.3	121	1.6	85	1.6
10	7,335	5,794	79.0	3,983	79.9	1,127	15.4	734	14.7	414	5.6	267	5.4
11	7,399	6,423	86.8	4,509	88.0	602	8.2	359	7.0	374	5.0	257	5.0
12	7,405	5,236	70.7	3,743	72.5	2,067	27.9	1,356	26.3	102	1.4	67	1.3

BOSSIER PARISH ELECTIONS FEATURING BLACK CANDIDATES 1979-1993

The attached chart reflects virtually all elections in Bossier Parish during the period 1979 through 1993 for local offices featuring one or more black candidates, for which we have election returns. It does not include, however, elections for offices in the City of Shreveport as there is only one precinct in Bossier Parish (Precinct 2-23), which is located in Shreveport. This precinct represents only a small fraction of the city, the vast majority of which is located in Caddo Parish.

The abbreviation to the left of the dash in the "Dist." column denotes the jurisdiction, as follows:

B	Benton
BC	Bossier City
H	Haughton
JDC	Judicial District Court (the 26th JDC consists of Bossier Parish and Webster Parish; the data reported reflect the results of the election only in Bossier Parish)
PD	Plain Dealing
PJ	Bossier Parish Police Jury
SB	Bossier Parish School Board

The abbreviation to the right of the dash in the "Dist." column denotes the office being filled and/or the district number (or letter) for the office, as follows:

A	Board of Alderman
AL	At Large position
C	City Council
M	Mayor

BOSSIER PARISH ELECTIONS FEATURING BLACK CANDIDATES 1979-1993

Election	*Dist.*	*% Black (Census)*	*Candidate(s)*	*Race*	*Vote (%)*
05/19/70 Sp. Pri.	BC-C2	39.4 (1980)	John Burnes	W	60 (12.2)
			Johnny Gipson	B	201 (40.9)
			Anthony Provenza	W	205 (41.7)
			J.G. Stahl	W	26 (5.3)
06/23/79 Sp. Gen.	BC-C2	39.4 (1980)	Johnny Gipson	B	324 (48.9)
			Anthony Provenza	W	339 (51.2)
10/27/79 Primary	PJ-J	42.7 (1980)	Johnny Gipson	B	459 (55.2)
			Thomas McDaniel (I)	W	373 (44.8)
04/05/80 Primary	B-A2	57.1 (1990)	Oscar Grubb	W	54 (48.2)
			Rutha Richardson	B	58 (51.8)
10/17/81 Primary	SB-C	28.1 (1980)	Floyd Coleman	B	389 (38.5)
			Annie Johnston	W	401 (39.7)
			Ken Larsen	W	150 (14.8)
			Nonnie Moak	W	71 (7.0)
11/28/81 Runoff	SB-C	28.1 (1980)	Floyd Coleman	B	584 (40.5)
			Annie Johnston	W	858 (59.5)
04/03/82 Primary	PD-A2	Data unavail.	Tommie Nance	B	Unopposed
10/22/83 Primary	PJ-7	29.3 (1980)	James Abrams	B	358 (22.1)
			Jerry Baker	W	385 (23.8)
			Pete Glorioso	W	875 (54.1)

BOSSIER PARISH ELECTIONS FEATURING BLACK CANDIDATES 1979-1993

Election	*Dist.*	*% Black (Census)*	*Candidate(s)*	*Race*	*Vote (%)*
10/22/83 Primary	PJ-10	37.9 (1980)	Jerome Darby	B	407 (33.0)
			Johnny Gipson (I)	B	260 (21.0)
			Thomas McDaniel	W	568 (46.0)
11/19/83 Runoff	PJ-10	37.9 (1980)	Jerome Darby	B	328 (53.2)
			Thomas McDaniel	W	289 (46.8)
04/07/84 Primary	B-A1	75.5 (1990)	J.C. Goines, Sr.	B	58 (46.8)
			Thelma Harry	B	66 (53.2)
04/07/84 Primary	B-A2	57.1 (1990)	Rutha L. Richardson	B	Unopposed
04/07/84 Primary	H-AAL	30.2 (1980)	James Bell (E)	B	396 (14.8)
			Curt Camp (D)	W	110 (4.1)
			Cashie Cole, Jr. (R)	B	237 (8.8)
			John Garland, Jr. (R)	W	213 (7.9)
			Thomas Hill (D)	W	200 (7.5)
			Conrad Isom (E)	W	357 (13.3)
			Mike Keith (E)	W	160 (5.7)
			Billy Joe Maxey (R)	W	230 (8.6)
			Johnny Ruffin (D)	B	211 (7.9)
			Shirley Stephens (E)	W	341 (12.7)
			M.H. Walker, Jr. (R)	W	228 (8.5)

BOSSIER PARISH ELECTIONS FEATURING BLACK CANDIDATES 1979-1993

Election	*Dist.*	*% Black (Census)*	*Candidate(s)*	*Race*	*Vote (%)*
05/05/84 Runoff	H-AAL	30.2 (1980)	Cashie Cole, Jr.	B	236 (41.0)
			John Garland, Jr.	W	96 (16.7)
			Billy Joe Maxey	W	133 (23.1)
			M.H. Walker, Jr	W	111 (19.3)
03/30/85 Primary	BC-C3	17.0 (1990)	Wanda Bennett	W	1,033 (82.8)
			Odis Easter	B	214 (17.2)
04/05/86 Sp. Pri.	B-A2	57.1 (1990)	Zella Mayfield	B	Unopposed
09/27/86 Primary	SB-J	30.1 (1990)	Jeff Darby	B	343 (45.7)
			Ruth Sullivan (I)	W	408 (54.3)
10/24/87 Primary	PJ-10	31.9 (1990)	Jerome Darby (I)	B	506 (60.5)
			Johnny Gipson	B	146 (17.4)
			Thomas McDaniel	W	185 (22.1)
10/1/88 Primary	JDC-26	20.1 (1990) Bossier Parish only	Dewey Burchett, Jr.	W	11,163 (64.3)
			Bobby Stromile	B	6,197 (35.7)
10/01/88 Primary	PJ-3		Jerry Chandler	W	449 (20.5)
			Larry Sharrah	W	523 (23.9)
			Marshall Smith	W	203 (9.3)
			Jessie Turks	B	0
			Don Whittington	W	1,014 (46.3)

BOSSIER PARISH ELECTIONS FEATURING BLACK CANDIDATES 1979-1993

Election	*Dist.*	*% Black (Census)*	*Candidate(s)*	*Race*	*Vote (%)*
10/1/88 Primary	H-M		Lurlene Butler	W	299 (49.3)
			Harold Lee	W	308 (50.7)
			R.G. Aldricht	W	273 (10.0)
			James Bell	B	362 (13.2)
			Cecil L. Blackstock	W	343 (12.5)
10/01/88 Primary	Benton Police Chief	41.3 (1990)	Raymond Champion	W	264 (39.2)
			J.W. Hollis	W	165 (24.5)
			Robert T. Smith	B	245 (36.4)
11/08/88 Runoff	Benton Police Chief	41.3 (1990)	Raymond Champion	W	467 (58.0)
			Robert T. Smith	B	338 (42.0)
04/01/89 Primary	BC-CAL	18.0 (1990)	Sonny DePrang (E)	W	4,750 (25.3)
			Jim Johnson (E)	W	7,168 (38.2)
			Randy Rowe (D)	W	4,619 (24.6)
			Don Rushing (D)	B	2,222(11.8)
04/01/89 Primary	BC-C4	18.9 (1990)	Bill Schwartz	W	922 (49.8)
			Earl Smith	B	137 (7.4)
			Billy Williams	W	791 (42.8)
04/01/89 Primary	BC-C2	25.6 (1990)	Donald Brown	W	449 (42.0)
			Jeff Darby	B	356 (33.3)
			Anthony Provenza (I)	W	265 (24.8)

BOSSIER PARISH ELECTIONS FEATURING BLACK CANDIDATES 1979-1993

Election	*Dist.*	*% Black (Census)*	*Candidate(s)*	*Race*	*Vote (%)*
04/29/89 Runoff	BC-C2	25.6 (1990)	Donald Brown	W	595 (48.5)
			Jeff Darby	B	631 (51.5)
10/06/90 Primary	SB-J	30.1 (1990)	Johnny Gipson	B	430 (46.8)
			Ruth Sullivan (I)	W	489 (53.2)
10/19/91 Primary	PJ-7	43.9 (1990)	Pete Glorioso (I)	W	1,099 (64.5)
			Leonard Kelly	B	604 (35.5)
10/19/91 Primary	PJ-10	26.9 (1990)	Jerome Darby (I)	B	Unopposed
10/19/91 Primary	H-M	27.9 (1990)	Cecil Blackstock (I)	W	458 (73.6)
			Mark Hill	B	67 (10.8)
			George Hunter	W	97 (15.6)
03/10/92	B-M	41.3 (1990)	Thelma Harry	B	218 (36.2)
			Joe Stickell	W	378 (62.8)
			Ronny Vaughn	W	6 (1.0)
10/03/92	H-AAL	27.9 (1990)	Pee Wee Anderson	W	294 (15.9)
			Cashie Cole, Jr. (I)	B	256 (13.9)
			Jack Hicks	W	323 (17.5)
			Mike Hollis	W	264 (14.3)
			Frank Jones	W	158 (8.6)
			Billy Joe Maxey	W	288 (15.6)
			Elbert Winfield	B	263 (14.3)

BOSSIER PARISH ELECTIONS FEATURING BLACK CANDIDATES 1979-1993

Election	*Dist.*	*% Black (Census)*	*Candidate(s)*	*Race*	*Vote (%)*
04/03/93 Special	SB-K	11.3 (1990)	Jerome Blunt (I)	B	93 (23.9)
			Juanita S. Jackson	W	296 (76.1)
10/16/93 Special	BC-C1	7.5 (1990)	Donald Ardoyno	W	436 (29.8)
			Gordon Blackman	W	881 (60.1)
			Will Jones	B	148 (10.1)
10/16/93 Special	BC-C2	42.2 (1990)	Jeff Darby (I)	B	416 (46.7)
			"Jim" Sawyer	W	474 (53.3)

CHRONOLOGY OF EVENTS

11/19/83	Jerome Darby elected to Police Jury.
11/13/90	Police Jury hires Gary Joiner to develop redistricting plan.
12/6/90	Police Jury Finance Committee appoints Technical Advisory Reapportionment Committee to work with Joiner on redistricting; Jerome Darby not included on the Reapportionment Committee.
12/11/90	Darby protests exclusion from Committee as a denial of "equal representation"; Police Jury votes to appoint him and white Juror James Elkins on Committee.
1/15/91	Police Jury passes over Jerome Darby for Presidency of Police Jury.
1/15/91 to 4/9/91	Joiner meets privately in his office with groups of 2 or 3 Police Jurors to discuss district configurations in their area. School Board member Thomas Myrick attends some of these meetings; meets with Joiner approximately five times.
4/1/91 to 5/15/91	Statutory "window" under Louisiana law for Police Juries to subdivide election precincts for redistricting purposes.
4/9/91	Public Police Jury redistricting hearing. Joiner presents 3 proposed plans, states that precinct splitting would be allowed through 5/15/91.
4/25/91	Public Police Jury redistricting hearing. Black residents ask questions regarding

black-majority district; are told that black population is too scattered to allow black district. Police Jury votes to pursue Joiner's Plan 9 for final adoption at next meeting.

4/30/91 Public Police Jury redistricting hearing. Joiner states that precinct changes could be made after 1/1/93 so as to consolidate precincts and reduce administrative election costs. Police Jury adopts Plan 9 as final plan. Concerned Citizens present letter to Police Jury complaining about redistricting process.

5/2/91 Joiner attends School Board meeting; is hired by School Board; estimates 200-250 hours to complete redistricting. Joiner states that School Board has more than adequate time to draw districts since the next School Board election is not until 1994.

5/14/91 Jerome Darby discusses Concerned Citizens letter at Police Jury meeting.

5/28/91 Police Jury submits Police Jury Plan to Department of Justice.

7/29/91 Department of Justice preclears Police Jury plan.

9/5/91 First School Board meeting at which redistricting discussed in substance. Joiner distributes precinct maps; states that School Board would have to work with Police Jury to alter precinct lines if it favored a plan which split precincts. Myrick immediately suggests adoption of Police Jury Plan.

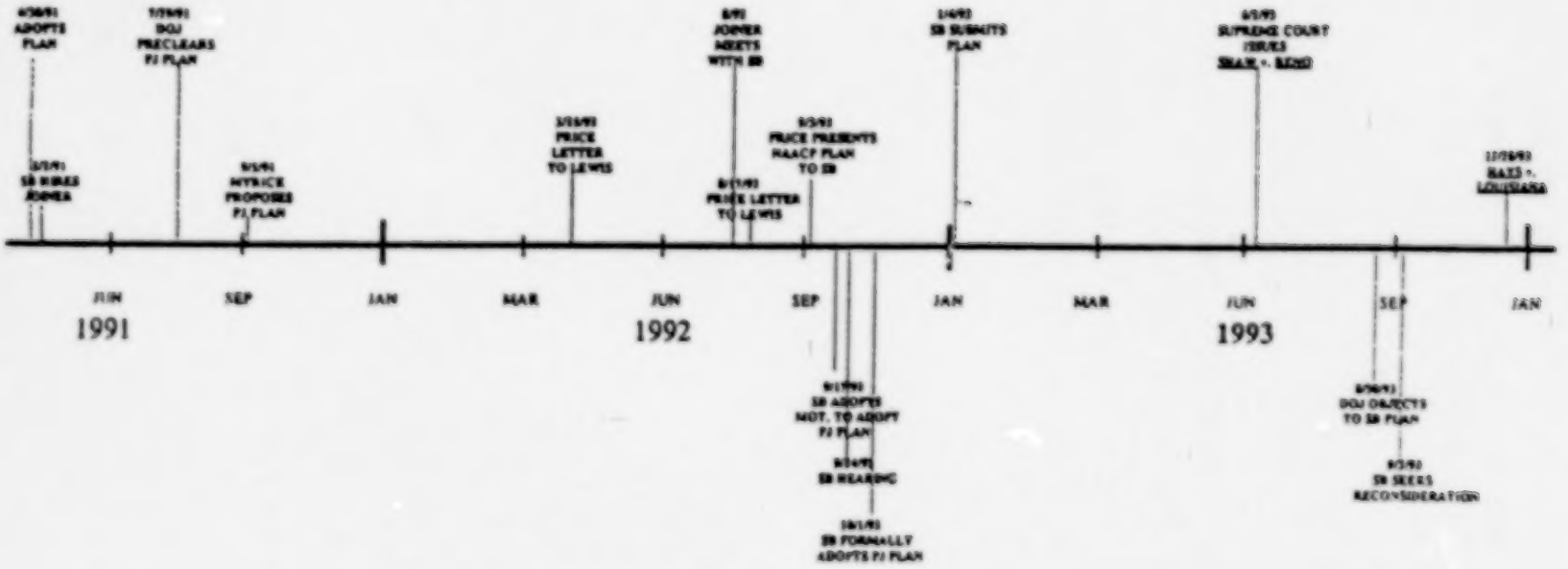
3/25/92	NAACP representative George Price writes letter to Superintendent Lewis requesting that NAACP be included in all phases of redistricting process; letter distributed to School Board members. No action taken on letter.
7/22/92	*Hays* v. *Louisiana (Hays* I*)* filed in federal district court.
Sometime in 8/92	Joiner meets privately with School Board members, demonstrating redistricting computer and showing alternative redistricting scenarios. NAACP not notified of meeting.
8/7/92	District court in *Shaw* v. *Barr* dismisses plaintiffs' 14th Amendment gerrymandering claim as failing to state a cause of action.
8/17/92	Price writes second letter to Lewis, requesting that NAACP be allowed to come before the School Board to present their views on redistricting, and stating opposition to PJ Plan or any other plan diluting minority voting strength.
8/20/92	Price presentation at School Board meeting re: various concerns, including appointment of a black School Board member to fill an existing vacancy, and participation of all parish citizens in redistricting. No specific action is taken by School Board on these requests.
Between 8/25/92 and 8/27/92	Price presents NAACP map of 2 illustrative black-majority districts to school and district official, who rejects plan because it does not contain a full 12 districts.

8/26 - 8/27/92	Preliminary injunction hearing in *Hays* v. *Louisiana (Hays I)* in federal district court.
8/27/92	District court in *Hays I* denies plaintiffs' motion for preliminary injunction, dismisses plaintiffs' constitutional claims, allows briefing on Section 2 vote dilution claims only.
9/3/92	Price presents full, 12-district NAACP Plan at School Board meeting. Joiner and School Board members summarily dismiss NAACP Plan because it crosses existing precinct lines.
9/10/92	Jerome Blunt appointed as first black School Board member in Bossier Parish history by a 6-5 vote at a special School Board meeting.
9/17/92	Jerome Blunt sworn in as member of School Board. At same School Board meeting, Price again presents NAACP Plan on behalf of the NAACP, Concerned Citizens of Bossier Parish, Men's Club of Bossier, Voter's League, Bossier Housing Tenant Coalition and Concerned Parents of Plain Dealing. School Board unanimously passes a motion of intent to adopt the Police Jury Plan, schedules 9/24/92 public hearing and 10/1/92 meeting for final action.
9/24/92	School Board hearing on redistricting held with full-capacity crowd. Price presents petition with over 500 signatures, urges consideration of NAACP Plan as a foundation for the creation of a plan with black-majority districts.
10/1/92	At School Board meeting, School Board adopts Police Jury Plan 10-1-1, Jerome Blunt abstaining (one member absent).

12/31/92	Date under Louisiana law by which school boards must reapportion.
1/1/93	Date under Louisiana law after which parishes could reconsolidate their precincts.
1/4/93	School Board submits plan adopted by Police Jury ("Proposed School Board Plan") to Department of Justice.
1/26/93	"Community Affairs Committee," formed at request of black community, holds its first meeting to discuss School Board matters.
3/5/93	Department of Justice asks School Board for more information re: redistricting plan.
3/16/93	School Board disbands Community Affairs Committee.
6/29/93	Supreme Court issues opinion in *Shaw* v. *Reno.*
8/19 - 8/29/93	Supplemental evidentiary hearing in *Hays* v. *Louisiana (Hays I).*
8/30/93	Department of Justice objects to School Board's Proposed Plan. Objection letter points out the School Board's option of asking the Police Jury to change precinct lines to allow drawing of black-majority districts.
8/31/93	Copies of Department of Justice objection letter provided to all School Board members.
9/2/93	In executive session at School Board meeting, School Board discusses its options in light of Department of Justice objection. No discussion of attempting to draw black-majority districts occurs. In public, School Board unanimously votes to seek reconsideration from Department of Justice.

9/3/93	School Board seeks reconsideration of objection in letter to Department of Justice.
9/16/93	Price presentation at School Board meeting on behalf of coalition of black organizations asking School Board to reconsider its decision to seek withdrawal of objection. School Board does not respond to Price's suggestion.
12/20/93	Department of Justice declines to withdraw objection.
12/28/93	LA district court issues decision in *Hays* v. *Louisiana*.
1/11/94	Police Jury resolves not to redraw its redistricting plan.
7/8/94	School Board files *Bossier Parish School Board* v. *Reno*.

CHRONOLOGY OF EVENTS



Excerpts from U.S. Exhibit 86 (Designations of portions of Deposition of School Board Member Susan J. Barrera dated September 30, 1994)

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[60]

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Q. Why does Bossier Parish still have schools with predominantly black student enrollment?

A. Because those people have not moved into predominantly white neighborhoods.

Excerpts from U.S. Exhibit 87 (Designations of portions of Deposition of School Board Member Barbara Blaylock dated October 6, 1994)

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[97]

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Q. Why does Bossier Parish have predominantly black schools?

A. Have predominantly black? Probably because of just the area in which they are.

Excerpts from U.S. Exhibit 90 (Designations of portions of Deposition of School Board Member Henry Burns dated October 6, 1994)

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[119]

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Q. Why does the Bossier Parish school district have schools with predominantly black student enrollment?

A. Why do Bossier Parish schools have schools that have predominantly black enrollment? Well, I am only, like, high schools or elementary schools.

Q. Well, for example, Butler Elementary School. Why, in your view, is Butler Elementary School a predominantly—first of all, are you aware that the district has schools that are —

A. Yes, like Plain Dealing and brand Bossier High. I am pretty well familiar with the percentages at most of the schools, but I think the neighborhood school concept.

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[120]

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Q. And Butler Elementary School and Bossier Elementary School are also near one another; isn't that true, are physically near one another?

A. Yes.

Q. What about Plain Dealing High School and Plain Dealing Elementary School is that the same?

A. Yes. They are located in the northern, you know, rural part of the parish.

Q. I take it their predominantly black student enrollment, in your view, is due to the demographic makeup of the area of their attendance boundaries?

A. Yes.

Excerpts from U.S. Exhibit 93 (Designations of portions of Deposition of School Board Member Barbara Gray dated September 19, 1994)

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[68]

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Q. When you were talking about the two areas where you thought it would be possible, if you sat aside concerns about splitting precincts to conceivably draw a black majority district, you mentioned the Plain Dealing area and you also mentioned district G, Ms. Sullivan's district, when you talk about District G, are you talking about District G in the current plan as opposed to the proposed plan?

A. The current plan that we have, that is what I am referring to.

Q. Let me hand you what I have marked as School Board Exhibit Eleven and let me just ask you, is that the old plan from the 1980s, the one that current school board members are sitting under?

A. Yes.

Q. On that document, is that the District G that you are talking about?

A. Yes. Wait a minute, let me see. No. No. District J is the one. And possibly G, but I would say J over G first. I got G and J confused and I am sorry.

Q. Both of those districts are in the Bossier City area?

A. Right.

Q. And District G is the district that contains or is quite near Bossier Elementary and Butler Elementary?

A. Yes.

Q. Which are both predominantly black elementary school, right?

A. Yes.

* * * *

[71]

* * * *

Q. And, isn't it a fact that today Butler is a predominantly a black school?

A. It may be. Yes.

Q. And isn't it a fact that when you joined the board —?

A. That is not—that is just because that is where they happen to live.

Q. And I guess that the same would be true for Bossier elementary school, which is even more predominantly black?

A. That happens to be, I guess, where they have their population that feeds the school.

Excerpts from U.S. Exhibit 95 (Designations of portions of Deposition of School Board Member Juanita Jackson dated September 29, 1994)

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[36]

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Q. Why does the school district still have predominantly black schools?

A. Our attendance lines determine where a person would go to school and if the area surrounding that school is predominantly black, that is where they would go to school.

Q. Where are those areas that are predominantly black?

A. Plain Dealing. And I do not if there are any others that are predominantly black.

Q. Are you aware that Bossier Elementary School is predominantly black attendance?

A. I know that we do have blacks and whites attending there, but I do not know what the racial makeup is.

Q. Are you aware that Butler elementary school is also predominantly black?

A. Because of the location of those schools, if the area surrounding them is predominantly black, then they would be predominantly black, but I really do not know.

Q. They are in the Bossier City area; is that correct?

A. Yes.

Q. And they are [near] one another?

A. Yes, they are.

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Excerpts from U.S. Exhibit 97 (Designations of portions of Deposition of School Board Member David L. Harvey dated September 30, 1994)

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[62]

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Q. Are you aware of what the district's obligations are under the consent decree?

A. No. I am not familiar with it.

Q. Why is it that the Bossier Parish school district has predominantly black schools?

A. Predominantly black schools.

Q. Yes. Schools with predominantly black student enrollment?

A. I would suppose it has to do with the fact that our schools are set up on what I would regard as the neighborhood school concept. Children attend school at a school near their home. I do not know, historically back years ago when busing was a real hot issue in many parts of the country, at that point, I was not involved in school board activities. I do not even remember if I had any children at that time. I do not know if busing was an issue here to get children moved around for purposes of racial balance or anything like that. It is just, ever since I have been a resident of Bossier Parish, we have more or less, and I am using my own term, my operated on the basis of a neighborhood school concept.

Q. If Butler Elementary School and Bossier Elementary School were both predominantly black schools, it would be largely because they are in black neighborhoods?

A. I would suspect so, yes.

Q. Why is it in your view that Plain Dealing Elementary and Plain Dealing High School are predominantly black?

A. Those schools are located in rural parts of the parish and, I believe would more than likely be populated by predominantly black families. It seems to make sense to me.

Excerpts from U.S. Exhibit 98 (Designations of portions of Deposition of School Board Member Boyce Hensley dated September 30, 1994)

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[73]

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Q. Why does the Bossier Parish public school system have predominantly black schools today?

A. Because of the location of the school and the community concept.

Q. So, Bullers Elementary School and Bossier Elementary School are predominantly black schools because they are in predominantly black neighborhoods?

A. That is correct.

Q. And, in fact, they are contiguous, their attendance zones are very near one another, those two schools?

A. Yes, sir.

Q. Similarly Plain Dealing Elementary School and Plain Dealing High School are predominantly black in your view, for what reason?

A. Because the people that live in that area, the neighborhood system there, the percentage is higher with black than it is in the Airline district.

Excerpts from U.S. Exhibit 99 (Designations of portions of Deposition of School Board Member Marguerite Hudson dated September 29, 1994)

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[13]

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Q. Do you know what the percent of— the black percentage student enrollment is in the public schools in Bossier Parish?

A. No, but I could know. It is certainly not anything like what Caddo has. It is around—I [14] don't know. I would rather not guess on the record. I have an idea though.

Q. What is your idea?

A. Well, it is not 20 percent. I don't believe it is 20 percent.

Q. Is it more or less?

A. Less.

Q. Less than 20 percent black students?

A. Yes. But that's—I really don't like to go on the record with being that vague.

Q. What is the minority student enrollment in Caddo Parish? Approximately?

A. It is more than 50 percent. It is about 60/40, I believe. This is common understanding. I am not sure that it is valid figures.

Q. Does that make a difference between the two parishes and the school system?

A. Their ratio as contrasted to our ratio?

Q. Yes.

A. It does.

Q. And what is the difference?

A. You are asking me, "Does it make a difference?"

Q. Yes.

A. And it makes a difference in that some [15] people from Caddo, a good many people have moved to Bossier Parish, in order to get to a school system which has a higher white ratio to blacks. That is one of the reasons that the parish, Bossier Parish is increasing in population, as much as it is. That is just about it.

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[85]

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Q. Why is it that the Bossier Parish has predominately black schools, in 1994?

A. Well, the black children's parents do not have cars to transport them to white schools.

Q. So the District doesn't provide transportation for a majority/minority plan?

A. We would. We do. We have that written into our policy. And we would. They do not want to go to a majority white, they want to stay right with their own. They know that they can go to a majority white. They want to stay right with their own.

They know that they can go from majority to minority, I mean, from minority to majority, and we would give them transportation. They can get a—

Q. So why are there predominately black schools?

[86]

A. They like to go to school with their community.

Q. So it is a question of residential area, that are predominately black?

A. Right. Right. It is fiction that they want to go out there, and be with some people that they are not like.

Q. So,—

A. —you just go into one of these schools, and just ask them.

Q. So, Butler Elementary School, and Bossier Elementary School, are predominately black schools in your view, because they are in predominately Black neighborhood in Bossier City?

A. Certainly. Certainly.

Q. And the new one, that is?

A. Right. I believe our policy says that they would have to, I don't know about the transportation. I would need to look at the written policy.

Q. What about Plain Dealing Elementary, and Plain Dealing High School, those are also predominately Black schools, aren't they?

A. What about it?

Q. They are predominately Black schools.

[87]

A. What do you want me to say about it?

Q. Yes, or no?

Q. Oh, they are. And those people love to live Plain Dealing. They love to live up there.

Q. Okay.

A. And most of them don't want to get a big job, they would just rather stay out there in the country, and stay on Welfare, and stay in Plain Dealing.

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[96]

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Q. Okay. Would you say—are you familiar at all with Bossier City?

A. Oh, indeed.

Q. Okay. Would you say that there are indeed, [9] communities within the city of Bossier City?

A. Well, there are two, basically, Black communities, within the city, wherein, you probably could, if you could get away from this precinct business, you could come up with some kind of district, Black district. Old Bossier, and Northgate, as I call it.

Q. Yes.

A. Northgate is this over here by Barksdale, on the North end of Barksdale, and that is where a person, who—

Q. Excuse me. Could you show me where old Bossier is on that map?

A. Down in here.

Q. Let the record reflect that the witness is pointing to the left central portion of the City of Bossier.

A. And it would make a lot of sense because you have Butler, and Bossier, Bossier Elementary,

Excerpts from U.S. Exhibit 100 (Designations of portions of Deposition of School Board Member Michelle Rodgers dated September 30, 1994)

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[14]

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Q. Where is the black population in Bossier Parish?

A. Well, there is quite a bit around Plain Dealing. There is quite a bit in my district.

Q. Where, specifically, in your district?

A. In the area around Butler Elementary. And Bossier Elementary.

Q. Could you describe that in terms of the city?

A. In terms of the city, Scott Street, Green Street, those areas of Old Bossier.

Q. So, Old Bossier is in your district?

A. Yes. There is another large area of blacks in [15] Ms. Sullivan's district. They refer to that as Jack's quarters.

Q. That is in the city of Bossier?

A. Yes.

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[100]

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Q. Why is it that the Bossier Parish school district has predominantly black schools? Why is it that the Bossier Parish school district has predominantly black schools?

A. I can only think of two in the parish that would be predominantly black.

Q. What are those?

A. Butler Elementary, which is in my district. And probably Plain Dealing would be predominantly black.

Q. Why are those schools predominantly black?

A. I would assume that Plain Dealing, well, first of all, Plain Dealing has a private school, Plain Dealing Academy and a lot of kids in that area go to that private school. There are also a lot of black people who live in that area. Mr. Myrick could better answer that since he is more familiar with the Plain Dealing area.

Butler Elementary is in the opposite section of my district. I do not live very close to there, but there are black neighborhoods [101] surrounding that school.

Q. Why is Bossier Elementary a predominantly black school?

A. Well, it is geographically very close to Butler Elementary.

Q. Why is Plantation Park Elementary School a predominantly black school?

A. There is a housing project down the street from Plantation Park, which I believe is predominantly black.

Excerpts from U.S. Exhibit 101 (Designations of portions of Deposition of School Board Member Ruth Sullivan dated September 29, 1994)

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[83]

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Q. Why do you still have predominantly black schools in the Bossier Parish school district?

A. One is because Butler, when we tried to move, get an equal, move those kids from Butler, the people rose up in arms and said, "We want our neighborhood school," and we did everything that we could to make sure that they had their neighborhood school. And, Butler is one of our predominantly black schools.

Q. Butler is in a black neighborhood, that is why it is a predominantly black school?

A. Yes.

Q. What about Bossier Elementary School?

A. Same difference.

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Excerpts from U.S. Exhibit 96 (Designations of portions of Deposition of Bossier Parish Registrar of Voters William Johnston dated October 12, 1994)

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[10]

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Q. Okay. You change and realign precinct boundaries even separate and apart from reapportionment, correct?

A. We do, yes.

Q. How—about how often do you do that?

A. Oh, three or four years, every three or four years.

* * * *

Q. When you do the precinct realignments you can take a large precinct and split it into two—that might be one thing you could do, correct?

A. You could.

Q. Another thing you might do is take two smaller precincts combine them into one, correct?

A. You could.

Q. That's called a precinct consolidation?

A. Uh-huh. (Affirmative)

Q. And you could actually split a large precinct into more than two if you wanted to, correct?

A. Well, it depends on a lot of—on certain situations.

Q. Okay. Tell me about that.

A. Well, it depends if it's inside the city limits or outside the city limits. In other words, the precinct has to

be wholly within or without the city limits. In other words, you can't take a precinct and have part of it in and part of it outside the city limits.

Q. So you couldn't consolidate a precinct outside the city limits with one that's inside the city limits?

A. No.

Q. But you could consolidate two precincts that were inside the city limits together?

A. We could if it was approved by the Justice Department.

Q. And you could consolidate—two precincts that were outside the city limits you could consolidate them together?

A. If it was approved by Justice Department.

Excerpts from U.S. Exhibit 102 (Direct Testimony of former School Board Member Jerome Blunt dated April 10, 1995)

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[3]

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5. I wanted to serve on the school board for the same reasons that I served on other policy making bodies. I was concerned as a parent about what my children were being taught. I enjoy being on the policy making end of things and felt that with my background as a parent and my work in special education, I could make a significant contribution to the school district.

6. I also felt that it was important to have minority representation on the school board. Blacks in Bossier Parish do not feel a part of the school system. They feel that, because they do not have representation on the board, they do not have a voice in the decision making and that they are unable to bring about change in the school system. Minority groups, such as the NAACP and the Bossier Concerned Citizens Association, have worked [4] together and presented their issues as a coalition in an attempt to bring to the attention of the school board that the concerns of the black community are not isolated incidents, but real concerns of blacks throughout the parish. The black community's feelings that the school board does not take their concerns seriously are justified because the school board has not been responsive to the concerns raised by the coalition. The most recent example of this lack of responsiveness that I can think of is the board's reluctance to provide the minority coalition with information they had requested relating to the disparities in graduation rates or suspension and expulsion rates between white students and

black students. Some of the members of the board are convinced that Mr. Price, president of the local chapter of the NAACP and spokesperson for the minority coalition, is only interested in information like this so that he can use it against the school board. Because of this attitude, they miss the fact that the members of the minority coalition are genuinely interested and concerned about our young people and request information like this so that they can better understand the problems facing our black school children. They wish to work with the school system to develop policies aimed at addressing the needs of black students.

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[5]

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8. I took the oath of office as a school board member on September 17, 1992, at the end of the board's redistricting process. At the same meeting, the NAACP presented, for a second time, a map of a redistricting plan for the Bossier Parish School Board that created two black-majority districts. The board did not take the NAACP plan seriously and never gave the plan any serious attention. School board member Boyce Hensley called the plan "ridiculous." School board member Ruth Sullivan, in response to the idea of creating black-majority districts to provide an opportunity for elected black representation on the board, remarked that she could represent blacks as well as a black could.

9. It was my impression, by the time I took office, that the members of the board had already decided informally to adopt the police jury plan, which had no black-majority districts. In fact, at the September 17, 1992 school board meeting, the board passed a motion of intent to adopt the police jury plan and adopted the plan at the next board meeting on October 1, 1992.

[6]

10. In between the September 17 and the October 1 meetings of the school board, I participated in discussions with other school board members regarding the merits of the police jury plan and the NAACP plan. In particular, I recall a discussion at the September 24, 1992, public hearing on the plan about the opposition to the police jury plan presented by Mr. George Price on behalf of the minority coalition. Mr. Price stated that he had consulted with the national chapter of the NAACP and that their lawyers agreed that the police jury plan violated the Voting Rights Act because it did not fairly represent minority voting strength. Price further stated that the board's concerns about the splitting of precincts in violation of state law was superseded by the necessity to comply with federal law. I thought that Mr. Price's presentation raised some concerns that the board needed to address, but there was no further discussion about adopting a plan that was more fair to blacks. I was surprised that some of the board members like Barry Musgrove and Tom Myrick, who had earlier expressed concern about adopting a redistricting plan that met with the approval of the Justice Department, were so willing to ignore the issues raised by the local and national chapters of the NAACP. In fact, I would say that Tom Myrick was one of the most vocal supporters of the school board adopting the police jury plan.

11. To my knowledge, the school board never asked Mr. Joiner about attempting to come up with a plan of his own that might facilitate black representation on the board.

[7]

12. I abstained from voting on adopting the police jury plan at the October 1, 1992 school board meeting. I felt the police jury plan was not fair to blacks and that

by abstaining I would draw more attention to this fact. I made a statement before the final vote on the plan. While I do not recall the exact words I said, the intent of my statement was to make a plea to the board to listen to and to work more closely with the minority coalition in an effort to make the minority community feel more a part of the system. I recall that I also voiced my concern about the lack of minority representation on the school board and that the police jury plan would do nothing to change that. There was no response from any of the school board members to my statement.

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Excerpts from U.S. Exhibit 106 (Direct Testimony of S. P. Davis)

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1. I reside at 2129 North Cross Drive, Shreveport, Louisiana 71107. I have lived at this address for four years. I am an attorney and have practiced law for 20 years. I am currently the sole owner of the Davis Law Office, 4050 Linwood Avenue, Shreveport, Louisiana. I graduated from Southern University Law School in Baton Rouge, Louisiana. I also hold the rank of Lt. Colonel in the Army Reserves. I am the Battalion Commander of an Infantry Battalion stationed in Bossier City, Louisiana. I am married and have three children. My wife is an elementary teacher at the T.L. Rhodes Elementary School in the Bossier Parish School District. My oldest son is 24 years old and attended schools in the Bossier Parish School System for 12 [2] years. My daughter is 14 years old and attended Princeton Middle School in the Bossier Parish School System. She currently attends Bird High School in Caddo Parish. My youngest son is in the 5th grade at Platt Elementary School in the Bossier Parish School System.

2. I was raised in Bolinger, Louisiana, a small community located north of Plain Dealing in Bossier Parish, Louisiana. I attended the segregated school system in Bossier Parish. I graduated from the all-black Carrie Martin High School, which is now an elementary school. I still have family in Bossier Parish.

3. I am the attorney of record for the plaintiff-intervenors, the Bossier Citizenship Education Program, Inc. ("BCEP"), in *Lemon* v. *Bossier Parish School Board*,

C.A. No. 10,687 (W.D. La.) and have represented the BCEP since they sought intervenor status on February 12, 1976, which was granted on March 2, 1976.[1] The *Lemon* case was originally commenced on December 2, 1964, when black plaintiffs brought suit under 42 U.S.C. 1983 to desegregate the public schools of Bossier Parish. The school board was subsequently found liable for intentionally segregating the public schools in Bossier Parish in violation of the Fourteenth Amendment to the United States Constitution. *Lemon* v. *Bossier Parish School Board*, 240 F. Supp. 709 (W.D. La. 1965). From 1965-70, the parties were engaged in protracted litigation in which the Bossier Parish School Board strongly [3] resisted the desegregation of its schools, advancing one inadequate remedial plan after another, including three plans that were rejected by the Fifth Circuit Court of Appeals. On January 20, 1970, the current desegregation plan was approved by the *Lemon* court. The school district has never been declared unitary and that decree, with some modifications over the years, remains in effect today.

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[11]

22. The low number of black administrators, principals, and teachers in the school district and the fact that the school board has systematically shut out the black community from the policy and decision making aspects of the school system have adversely affected the black students in the Bossier Parish schools. These factors combine to create an atmosphere of racial hostility in the schools and result in black students having higher

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[1] The United States was granted intervenor status as a plaintiff on April 3, 1965.

drop-out rates because they do not receive the same encouragement to excel as the white students. This is particularly true in the schools with student populations that are more than 80 percent white with corresponding faculties that are more than 80 percent white. Black students have higher suspension and expulsion rates than the white students in these schools. Black students are also less involved in extracurricular activities, such as cheerleading and dancelines, where the selection for these activities is done by the white [12] teachers. Years of having predominantly, if not exclusively, white squads in these activities has lowered the spirit and self-esteem of the black students, who no longer feel it is even worth competing because they will not be selected based solely on their race. A recent example at Haughton High School demonstrates that the school board's faculty hiring practices and attitude toward black students have perpetuated an atmosphere of racial hostility in the schools and in the community. In January, 1993, black students at Haughton High School protested the election by the student body of an all-white Winter Court, an event that takes place during basketball season. After the students' protest, the school administration took steps to include black students on the court. This effort fueled the long-standing racial tensions in the school and community. Threats of violence resulted in the school administration cancelling the Winter Court events.

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[16]

30. As I said earlier, I was raised in the Plain Dealing area of Bossier Parish and remain in touch with this

area through familial and professional ties. It is my understanding from counsel for the United States that the school board has asserted in the instant case that a community of interest does not exist among the black people who would reside in an election district that would include the areas of Plain Dealing, Benton and Princeton. I disagree with that assertion. While the black communities in these areas reside in different towns, they are united in their quest for an end to racial discrimination in Bossier Parish. That unity is clearly demonstrated in their continued struggle against the school board to eliminate, to the extent practicable, the vestiges of racial segregation. The opportunity to elect members to the school board who would [17] represent their views would certainly enhance the possibility that one day the children in the Bossier Parish Schools will be able to exercise their constitutional right to attend a system of schools that is unitary.

31. I personally know only one of the Bossier Parish School Board members, Mr. Henry Burns. I know Mr. Burns because we serve together in the Army Reserves. I have spoken with Mr. Burns on several occasions regarding school board matters that concern black students and the black community. Mr. Burns told me that while he personally favors having black representation on the board, other school board members oppose that idea. Nevertheless, to my knowledge, Mr. Burns has never taken a public stand on this issue. Mr. Burns and I have also discussed other issues such as black teacher recruitment and hiring, and the lack of opportunity for black students to participate in extracurricular activities sponsored by the school district.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 94-01495
(LHS (USCA), CRR, GK)

BOSSIER PARISH SCHOOL BOARD, PLAINTIFF

v.

JANET RENO, DEFENDANT

v.

GEORGE PRICE, ET AL., DEFENDANT-INTERVENORS

DECLARATION OF DR. GEORGE CASTILLE

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I. INTRODUCTION

A. Qualifications and Experience

1. My name is George J. Castille, III, and I make this declaration pursuant to 28 U.S.C. 1746.

2. I received my Ph.D. in Geography at Louisiana State University in 1993. I teach Louisiana Geography at LSU and work full time as an independent consultant. Other teaching experience includes a course entitled "Old New Orleans and the Cajun Country" which was offered for continuing education credit for teachers, and I have also taught several introductory Geography and Anthropology courses. Over the past 10 years I have worked on about 12 to 15 projects involving disputes over boundaries or property ownership in south Louisiana. I gave expert witness depositions in two boundary dispute lawsuits, *Summersgill Dardar, et al. vs. Lafourche Realty Co. Inc.*, (E.D. La.) and *Hankamer et al. vs. Angelina Hardwood Lumber Co. et al.* (14th Judicial District Court, Calcasieu Parish). The expert witness testimony included interpretation of General Land Office Records, historic maps, and historical documents related to local and regional commerce. My Ph.D. research involved the analysis of Louisiana Supreme Court decisions related to the ownership of waterbottoms. This analysis explored the implications for changes in boundaries along the land/water interface as waterbodies are modified by natural means (see attached vita).

3. More recently, I co authored an expert witness report for *Ray Hays et al., vs. State of Louisiana. et al.* (W.D. La.), a case challenging the congressional districting plan for Louisiana on the grounds discussed in the Supreme Court decision in *Shaw* v. *Reno.* For the *Hays* case I conducted a geographical analysis of twentieth century congressional districts in Louisiana. I compared

the State's plan to prior Louisiana congressional plans and alternative plans proffered by the plaintiffs.

4. I have been retained by the United States to evaluate and compare the district boundaries of various Bossier Parish redistricting plans as to the extent the district boundaries follow such commonly used features as roads, streams, railroads, and corporate limits, and to analyze these plans from the perspective of such traditional redistricting principles as compactness and unifying communities of interest. I am being paid at the rate of $50.00 per hour.

B. Methodology and Data Collection

5. I have used available maps of Bossier Parish to compare the proposed 1992 School Board Plan, the NAACP Alternative Plan, and a second alternative plan developed by William S. Cooper, the redistricting expert employed by the defendant-intervenors in this case. Maps that were used to aid in the interpretation included Census maps, maps of prior redistricting plans in Bossier Parish, historical maps on file in the archives at the LSU Shreveport library, USGS topographic maps (scales 1:100,000, 1:62,500, and 1:24,000), maps produced by the computer-run geographic information systems (GIS maps) of both the United States and William S. Cooper, and road maps published by the Louisiana Department of Transportation and Development.

6. I also conducted a field investigation to examine the layout of the parish in detail and to determine the physical character of the boundary lines involved. During this field investigation, all major communities were visited and various roads were traversed from the Arkansas state line down to the southern end of the parish at the mouth of Loggy Bayou. During this trip, observations

were made as to the physical terrain, natural vegetation, obvious economic activities, settlement patterns, and concentrations of population. Such a field investigation is not necessary for a comparison of redistricting plans, which primarily involves the analysis of maps. In this case, however, the field investigation gave me a better picture of the specific sites on the maps which I analyzed, as well as a ground-level overview of the parish.

II . BACKGROUND AND HISTORICAL SETTING

7. A map of Bossier Parish is provided in Figure 1. Historically, the parish has changed from being primarily agricultural in character to being driven by commerce and industry. This change has driven population and migration trends, particularly with respect to blacks. In the decades after the Civil War, some black residents left the floodplain plantations for the far less agriculturally rich hill country and terraces. Those who remained on the floodplain plantations worked as sharecroppers, and the sharecropper system survived until the middle of the twentieth century. By the 1960s, most blacks had abandoned the floodplain plantations and had become concentrated in urban areas and the hill region. The limited economic potential of tenant farming and sharecropping was one reason why many blacks moved to the parish's cities and why others left the parish for the Northern states. This migration to the north and to urban areas began immediately after the Civil War and peaked during the 1930s and 1940s, accelerated by the Great Depression. (U.S. Census various years, Aiken 1978, Prunty 1955, Lewis 1987). The black out-migration from Bossier Parish continued through at least 1970, substantially reducing the black percentage within the parish. Specifically, the parishwide black percentage dropped from roughly 70% in 1890 to the roughly 20% level seen in 1990.

8. With the recent urban growth associated with the Shreveport-Bossier City metropolitan area, Bossier Parish is becoming increasingly urban in character. The present trend appears to be a continuation of the movement of African Americans from both the floodplain and hill regions to urban areas within Bossier Parish. Bossier City contains the largest concentration of African Americans; over half of the parish's black population lives in Bossier City. The black population within Bossier City is largely concentrated in only a few sections of the city, and the numbers are small compared to the city's white population. The black percentages are higher in the towns of Plain Dealing and Benton. Outside of urban areas, the greatest concentration of African American population in Bossier Parish now is still found in those hill and terrace regions, where soils provide the least agricultural (and therefore economic) potential.

III. COMPARING THE PROPOSED PLAN AND TWO ALTERNATIVES

A. Overview

9. The 1992 School Board Plan uses roads, streams, railroads, and corporate limits as boundary features. The plan relies heavily on roads and corporate limits, which in some cases causes splits of communities of interest—including, in several cases, black communities. The NAACP Plan avoids this fragmentation of communities by relying less on roads and corporate limits as boundaries, and more on streams. Overall, however, in terms of the use of logical, traditional boundary markers, the NAACP Plan is not significantly different from the 1992 School Board Plan. Many of the curves in the rural, northern-parish minority district in the NAACP

Plan are due to the use of natural boundaries such as streams. The Cooper Plan is similar to the NAACP Plan, except that the northern-parish minority district is more compact. Both plans demonstrate that two reasonably compact black-majority districts can be drawn in Bossier Parish for the Bossier Parish School Board. From the standpoint of adherence to traditional redistricting principles, the two alternative plans are no worse, and in some respects better, than the proposed plan.

B. Defining Boundaries

10. Boundaries associated with early settlement often correlated with physical features such as streams, lakes and ridges. However, the trend in post-colonial United States has been that of assigning boundaries based on artificial or man-made phenomena such as orientations of the compass, straight lines drawn between two landmarks, or roads.

11. As with other parishes, Bossier Parish has been subdivided into election districts that correspond to voting areas for Police Jury members, School Board members, or for other elected offices. Generally the district boundaries follow four common features: streams, roads, railroads and corporate limits. In cases where no physical or man-made feature exists, boundaries sometimes follow arbitrary lines that are related to property boundaries.

12. While common, the use of corporate limit lines as district boundaries can be problematic. Corporate lines are frequently drawn in an arbitrary manner. The arbitrariness can stem from an extension of corporate limits well beyond the area of present occupation in an effort to provide room for urban growth. Corporate lines are also a problem when they are not revised, or are revised

only infrequently, to accommodate urban growth outside the corporate limits. Either boundary phenomenon can result in the splitting of communities of interest.

C. The proposed 1992 Bossier Parish School Board Plan

13. As with previous districting plans, the 1992 Bossier Parish School Board Plan (Figures 2-A, 2-B) follows common boundary delimitation practices. District outlines follow typical boundary markers for parish subdivisions. As noted above, the more common district delimiters are roads, streams, railroads, and corporate limit lines. Several more unusual district boundaries include the limits of Barksdale Air Force Base and a division line that runs through the middle of the Air Force base.

14. A few other boundary anomalies were also observed. One example is the unusually shaped boundary along Highway 71 in south Bossier City (Figure 3, blue shading), where a long finger of land from District 12 extends into District 1, ending in a triangular head (Figure 3, Location A). This projection follows an odd-shaped corporate boundary for Bossier City (Figure 3, yellow shading). The Highway 71 anomaly may reflect both an attempt to exclude a stockyard (Figure 3, Location C) from the corporate limits while expanding the limits to include a new subdivision and trailer park (Figure 3, Location B).

15. In another instance, the Benton corporate limits serve as a district boundary, but this particular boundary fragments neighborhoods with economic and racial commonalities. The community of Benton has expanded outside the corporate limits in several areas, and until the corporate limits are revised to include those areas. of

expansion, the corporate limits will continue to fragment those black neighborhoods that straddle the corporate line. By following the corporate limits, the School Board Plan's district boundary reinforces the fragmentation of some black neighborhoods, splitting them between Districts 3 and 4. One cluster of black families lives along Shaffers Road along the east side of Benton (Figure 4, Location A), and the large black subdivision of East Benton lies along Highway 162 just north of the Benton Community Club Cemetery (Figure 4, Location B). Another group of black residents is located immediately north of the Benton corporate limits at the end of Second Street (Figure 4, Location C). The case of Benton illustrates how strict adherence to the legal corporate limits can exclude neighborhoods from the voting area of the social and cultural community as a whole—in this case, the black community. The NAACP and Cooper Plans avoid this fragmentation.[1]

16. As in Benton, the district boundary lines within Bossier City have effectively divided well-established neighborhoods that are predominantly black. For example, the area bounded by Shaver, Beckett, Fuller and McArthur Streets (Figure 6, green shading) is included

[1] While not directly related to the boundaries in the 1992 School Board Plan, the corporate limits of Plain Dealing, as they existed during the 1970s and 1980s, provide another recent example of a Bossier Parish community in which relatively large, predominantly black subdivisions lie immediately outside of the official limits of a community. In the case of Plain Dealing, the corporate limits were extended 1/2 mile to the southwest along a rural highway to incorporate a single white residence (Figure 5, Location A). (That extension was deannexed in recent years, at the request of the sole white resident included.) If the corporate limits were extended *less* than 1/2 mile to the west, then the official community could incorporate DeMoss Hill subdivision, a predominantly black neighborhood of over 50 homes and two churches (Figure 5, Location B). Another

within District 8 when it easily could have been placed within District 7, located immediately to the west. Culturally, this black neighborhood is more likely tied to the black residential area immediately to the west (Figure 6, Location D) than to the heavy commercial strip (Figure 6, pink shading) located along the four-lane Highway 3 (Benson Road) immediately to the east. By setting the boundary along the railroad, the School Board Plan has cut off this neighborhood from the larger community, thus separating approximately 35 houses. Under the School Board's Plan, then, a railroad serves as the arbitrary boundary between two districts, splitting a black community. A nearby road could just as easily have been selected as the boundary, and the larger neighborhood could have remained intact. This is a clear example where a black neighborhood is fragmented by district boundaries. This fragmentation is avoided in the NAACP and Cooper Plans.

C. The NAACP Alternative Plan

17. The NAACP Plan was generated from the 1990 Census database (1992 TIGER/Line Files) using a redistricting computer. The minimum unit of measure was the Census block. Census block boundaries, as designed by the Census Bureau, correspond to visible natural or man-made features.

18. The NAACP plan demonstrates that two reasonably compact districts could be drawn which encompass

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even larger black subdivision, known as Carstarphen Heights, is located immediately south of the corporate limit (Figure 5, Location C). Of course, none of the redistricting plans which I examined have boundaries which follow the Plain Dealing corporate limits; Figure 5 merely illustrates another example of "underbounding" within Bossier Parish.

the significant black population concentrations that exist in Bossier Parish, one in Bossier City (Figure 7-B) and one in the northern central, more rural region of the parish (Figure 7-A). This results in two majority-black districts. District 2 begins in the extreme northwestern corner of the parish and follows the Red River south, extending to the community of Princeton in the north-central part of the parish (Figure 7-A). District 1 is "C"-shaped and is located entirely within the heavily urbanized portion of Bossier City (Figure 7-B).

19. The NAACP alternative plan creates district boundaries that are significantly different from the boundaries of the proposed 1992 School Board Plan. Nevertheless, the alternative boundaries generally follow the same types of natural and man-made features as in the School Board Plan. The boundaries of the NAACP alternative correspond primarily to existing roads and streams, and utilize streams to a greater extent than the School Board Plan. The alternative plan also utilizes railroads, existing district lines, the limits of Barksdale Air Force Base, corporate limits of various communities, an electrical high power line, several rural unimproved roads, and parish ward boundaries. All of these types of boundaries of course reflect visible local features that outline the census blocks. Overall, in the use of logical features such as roads, streams, etc., as boundary markers, the NAACP Alternative Plan is not significantly different from the proposed plan.

20. Stream boundary correlations were noted in at least 14 locations as opposed to 6 in the School Board Plan. While some of the districts in the alternative plan are more elongated than districts of the proposed School Board Plan, this is due to the greater use of streams as boundaries. The more extensive utilization of streams as boundaries is a positive factor. As discussed above, the

use of roads in the School Board Plan has in some cases resulted in the fragmenting of communities of interest. This is not the case with the use of streams as boundaries in the alternative plan. Roads in Bossier Parish are used for transportation today far more than streams, and thus tend to attract settlements along both sides of the road. Conversely, communities of interest straddle streams in Bossier Parish to a much lesser extent, and using streams as boundaries is less problematic.

21. The "fingers" or small projections along the east side of District 2 immediately southeast of Plain Dealing are simply reflections of Census block boundaries that follow stream courses (Figure 7-A, Location A). Irregular-shaped Census blocks, and therefore irregular-shaped district boundaries, are much more likely to occur in rural parishes with hilly terrain such as Bossier Parish than in relatively flat areas such as in the southwestern part of Louisiana.

22. Slightly irregular-shaped boundaries also occur in District 2 immediately north of Plain Dealing (Figure 7-A, Location B), within the Bodcau Wildlife Management Area in the east central part of the parish (Location C), and in the areas immediately north and east of the Black Bayou Reservoir (Locations D and E). These irregular shapes represent boundaries that follow local stream patterns and rural roads.

23. The NAACP alternative plan also differs from the School Board Plan in that, unlike the School Board Plan, district lines divide the corporate limits of Benton, Haughton and Plain Dealing. However, the strict adherence to corporate lines can exclude some subdivisions that are immediately outside the corporate limits but should be considered as part of the suburban core of these communities. As noted previously, examples of

excluded suburban development were found through a field and map investigation of the community of Benton (Figure 4). The NAACP and Cooper Plans avoid this division of areas with a community of interest.

24. Another way in which the alternative plan differs from the proposed plan is in the use of unimproved roads and a powerline as boundaries. While not evident on some parish maps, such features are easily recognizable on USGS topographic quadrangle maps and are of course readily identifiable to people living in the vicinity.

25. The NAACP plan demonstrates that Census blocks can be grouped in such a way that predominantly black districts are created. To create such districts it may be necessary to disregard some of the established official boundaries, such as corporate limits, particularly if those boundaries do not reflect cultural changes that are visible geographically. In the use of logical features such as roads, streams, etc., as boundary markers, the NAACP's Alternative is not significantly different from the proposed plan. It contrasts with the School Board Plan in that it emphasizes the cultural or social element (ie. where people actually live) rather than the strict adherence to arbitrary boundaries that in many ways are not reflective of the cultural conditions that exist today. It is important to realize that boundaries are not only a means of defining an area; boundaries are also a means of exclusion from an area.

D. The Cooper Alternative District 8

26. The final district plan examined in this study is one prepared by William Cooper (Figure 8). The Cooper plan creates a northern parish district that is at least 55 percent black in voting age population. The general shape and location of District 8 of the Cooper

plan is similar to District 2 of the NAACP alternative, but District 8 in the Cooper plan is a little shorter and more compact. With the exception of seven boundary segments, the delimitation of District 8 matches boundary features discussed in either the School Board Plan or the NAACP plan. These seven new boundary segments include roads, streams, and an unimproved road. All of these, of course, follow boundaries of Census blocks. As compared to the two previous plans, the types of features making up the Cooper plan boundaries are more similar to those found in the School Board Plan because it emphasizes roads to a much greater extent than streams.

27. The Cooper district is similar to the NAACP plan's District 2 in that both divide the corporate limits of the communities of Plain Dealing and Benton. But as noted in the School Board Plan discussion, in communities where an exclusionary settlement pattern occurs, the official corporate limits are not a fair representation of the community as a whole, and the exclusionary nature of this type of boundary invalidates the logic of strict adherence to corporate limit lines as a means of delimiting districts. Again, a boundary is created to serve the culture that creates it, not the other way around.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

/s/ GEORGE J. CASTILLE, III

GEORGE J. CASTILLE, III
April 4, 1995

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[Castille vita attached to U.S. Exh. 103 omitted from J.A.]

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DECLARATION OF DR. RICHARD ENGSTROM

Pursuant to 28 U.S.C. Section 1746, I, Richard L. Engstrom, make the following declaration.

1. I am currently research Professor of Political Science at the University of New Orleans, in New Orleans, Louisiana, and Chairperson of the Representation and Electoral Systems Division of the American Political Science Association. A copy of my current curriculum vitae is attached to this declaration as Appendix A.

2. I have done extensive research into the relationship between election systems and the ability of minority voters to participate fully in the political process and to elect candidates of their choice. The results of my

research have been published in the *American Political Science Review, Journal of Politics, Western Political Quarterly, Legislative Studies Quarterly, Social Science Quarterly, Journal of Law and Politics, Electoral Studies,* and other journals and books. Three articles authored or co-authored by me were cited with approval in *Thornburg v. Gingles,* 478 U.S. 30, 53 n.20, 55, 71 (1986), the Supreme Court decision interpreting amended section 2 of the Voting Rights Act. I have also testified as an expert witness in over 30 voting rights cases in federal courts across the United States.

3. I have been requested by attorneys for the Department of Justice to examine the extent to which voting in recent elections involving a choice between or among African American and white candidates in Bossier Parish has been "racially polarized," as that concept has been defined by the United States Supreme Court in *Thornburg v. Gingles.* According to the Supreme Court, voting is racially polarized when there is "a consistent relationship between (the) race of the voter and the way in which the voter votes " or expressed more simply, when "black voters and white voters vote differently" (at 53 n.21). I am being compensated at a rate of $800 per day for my work on this case.

4. Elections involving an interracial choice of candidates have been analyzed because such elections are considered to be the most probative of racially polarized voting. Elections presenting voters with a choice between or among African American and white candidates were the only elections referenced by the Supreme Court in *Thornburg* (see the review of the evidence at 52 and 58-61, and Appendix A at 80). The Fifth Circuit has ruled in *Citizens for a Better Gretna* v. *City of Gretna,* a Louisiana case, that "implicit in the Gingles holding is the notion that black preference is deter-

mined from elections which offer the choice of a black candidate." 834 F. 2d 496, 503 (1987).

5. As a general matter, the most relevant interracial elections to analyze are recent elections for the office at issue, but when only a few minority candidates have contested elections for that office, it is appropriate to analyze the voting in interracial elections to other offices as well [see *Westwego Citizens for a Better Gov't v. City of Westwego*, 872 F. 2d. 1201, 1208-1209 n.9 (5th Cir. 1989)]. I have analyzed therefore not only the three most recent interracial elections for seats on the Bossier Parish School Board, which were held in 1986, 1990, and 1993, but also other interracial elections. These include the only parishwide interracial election for a local office in recent years (the 1988 election for a seat on the 26th Judicial District Court) and all of the elections to local offices within the parish during the 1990s that involved an interracial choice of candidates.

6. Voters across all of Bossier Parish have been presented with a choice between or among African American and white candidates for local offices on only one occasion in recent years. That occurred in the 1988 primary election for a seat on the 26th Judicial District Court. In order to determine the extent to which voting in this election was divided along racial lines, I have performed a bivariate ecological regression analysis and a homogeneous precinct (or extreme case) analysis of this election. These are the standard methodologies, approved by the Supreme Court in *Thornburg*, for assessing racial divisions in voting through precinct-level election returns (at 52-53).

7. Homogeneous precinct analysis focusses on precincts in which the voters are predominantly of one race or the other. The votes cast in these precincts provide the basis for estimates, under this methodology, of

the level of support that each of the respective groups has provided a particular candidate. In the 1988 primary election, over 90 percent of the people signing in to vote was white in 25 of the 43 precincts in Bossier Parish. These precincts are identified therefore as homogeneously white. The African American candidate for the seat on the 26th Judicial District Court in this election, Bobby Stromile, was not the choice of the voters in these homogeneous white precincts. Stromile received 31.1 percent of the votes cast in this election in these 25 precincts, compared to 69.9 percent for his white opponent. The highest percentage of African Americans among those signing in to vote in any of the precincts was 75.1, so none of the precincts can be considered homogeneously African American and no extreme case estimates of the African American support for Stromile can be derived from this analytic technique.

8. Estimates of the support for Stromile among both African Americans and whites can be derived through regression analysis, however. This procedure relies on the votes cast in all of the precincts, not just those that are cast in racially homogeneous precincts. Regression analysis is based on a systematic comparison of the votes cast for the various candidates in each of the precincts and the relative presence of African Americans among those signing in to vote in each precinct. There is a very consistent relationship between the percentage of those signing in to vote that was African American in each precinct and the percentage of the votes received by Stromile in the precincts. This relationship can be summarized by a correlation coefficient, which has a value of 1.0 when the relationship is perfectly consistent. The value of the correlation coefficient for the relationship between Stromile's vote and the racial composition of the precinct is .842, which is statistically significant at .0001 (in other words, the

probability of a relationship of at least this magnitude occurring by chance is less than 1 in 10,000). The estimate of Stromile's support among the African Americans voting in this election, derived through regression analysis, is 79.2 percent. The regression-based estimate for his support among the whites voting in this election is 28.9 percent.

9. In addition to this latest parish-wide election, I have examined the votes cast in the last three elections for seats on the school board in Bossier Parish in which the voters in the respective districts had a choice between African American and white candidates. The most recent of these elections was in 1993. The other two occurred in 1990 and 1986.

10. The 1993 election was a special election for the District K seat on the parish school board. The African American candidate in this election, Jerome Blunt, had been appointed to this seat in 1992. He sought election to the seat the following year, along with one white candidate. District K is a homogeneously white district. At the time of this election, 92.0 percent of the registered voters in this district was white. On election day, 97.4 percent of those signing in to vote was white. Blunt was obviously not the choice of the white voters in this election. Blunt lost his seat on the school board to his white opponent, receiving only 23.9 percent of the votes cast. Even if every vote Blunt received had been cast by a white voter, and every African American who signed in to vote had cast a ballot for Blunt's opponent, Blunt would still have received only 24.5 percent of the white votes in this election. Which candidate was in fact the choice of the few African American voters in this election cannot be determined through these precinct-level data.

11. The 1990 and 1986 interracial school board con-

tests were both held in District J. The African American candidate in 1990 was Johnny Gipson, who competed with one white candidate for the position. In 1986 the African American candidate was Jeff Darby, who also competed for the position with one white candidate. Both of these candidates lost the election in this majority white district.

12. District J consisted of two precincts that have been described in this case's *Joint Statement of Material Facts and Conclusions of Law About Which There Is No Dispute* as "distinctive" and "unique" precincts in Bossier Parish (paragraphs 161 and 162). These were precincts 2-15 and 2-16, which included Barksdale Air Force Base and areas adjacent to the base. Many of the white voters in this area are military retirees who are not from Louisiana, let alone from Bossier Parish, and who therefore "tend on average to vote in a less polarized way" than other whites in the parish (paragraphs 162 and 163).

13. At the time of these elections, precinct 2-16 was homogeneously white and precinct 2-15 was racially mixed. In precinct 2-16, 97.4 percent of those signing in to vote in 1990 was white, and 99.2 percent of those registered to vote in 1986 was white. (Sign-in information is not available for elections prior to 1988.) In both of these elections, this precinct supported the white candidate. Gipson received 31.8 percent of the votes cast in this precinct in 1990, and Darby received 26.6 percent in 1986. In contrast, Gipson and Darby both won precinct 2-15 in these elections. African Americans constituted 48.9 percent of those signing in to vote in 2-15 in 1990, and 48.9 percent of those registered to vote in 1986. Gipson received 73.5 percent of the votes cast in that precinct in 1990, and Darby received 75.9 percent of the votes cast in 1986. While the data for these two

precincts do not provide a sufficient basis for deriving specific point estimates of the support of the different groups for Gipson and Darby, the contrast in candidate support between the two precincts certainly suggests that these African American candidates were the choice of the African American voters in these elections, but not the choice of the white voters.

14. In addition to the analyses reported above, I have also examined the vote in the six other elections in the parish during the 1990s in which voters were presented with a interracial choice of candidates. These elections occurred in different places around the parish. They include the elections for the District 1 and District 2 seats on the Bossier City Council in 1993, an election for the Haughton Board of Alderman and an election for Mayor in Benton in 1992, and a parish Police Jury election for District 7 and a mayoral election in Haughton in 1991. In all of these elections, a majority of those signing in to vote was white, and in all of these elections the African American candidates were defeated, including the two African Americans who were incumbents at the time.

15. In the Bossier City Council elections in 1993, Will Jones was the African American candidate in District 1 and Jeff Darby was the African American candidate in District 2. Jones had two white opponents, while Darby, an incumbent, had one white opponent.

16. Voters in five precincts, all of which were homogeneously white, participated in the District 1 election in Bossier City. The percentage of people signing in to vote in this district that was African American was 4.9. The African American candidate in this election, Jones, was not the choice of white voters, having received only 10.1 percent of the votes cast in this election.

17. The other Bossier City councilmanic election occurred in District 2. Precinct election returns and sign-in data indicate that in this election the African American voters preferred Mr. Darby while the white voters preferred his white opponent. Mr. Darby's vote exceeded his opponent's vote in the only two precincts in which a majority of those signing in to vote was black. He received 66.2 percent of the votes cast in precinct 2-8, in which 72.0 percent of those signing in to vote was black, and 57.5 percent of the votes cast in precinct 2-15, in which 85.5 percent of those signing in to vote was black. The only other precinct that Darby won was his home precinct, 2-16, a homogeneously white precinct in the Barksdale Air Force Base area in which he received 52.7 percent of the votes cast. Darby lost the other four precincts, three of which were homogeneously white. He received 36.7 percent of the votes cast in these precincts, and 46.7 percent in the district overall.

18. Darby's overall support among the African Americans voting in this election is estimated, through regression analysis, to be 61.0 percent, while his vote among the white voters is estimated to be 41.3 percent. The correlation coefficient for the relationship between the percentage of the votes received by Darby and the racial composition of the precincts is .569. This coefficient, based on only seven precincts, is not statistically significant. In the homogeneous white precincts Darby received 45.7 percent of the votes cast.

19. In October of 1992, Cashie Cole, an African American incumbent on the Haughton Board of Aldermen, lost his bid for reelection. This was an at-large election in which five seats were to be filled and each voter had five votes to cast. All of the votes cast in the Haughton election were cast in one precinct, so no estimates of the racial division in the vote can be pro-

vided. African Americans constituted a minority, 25.6 percent, of the people signing in to vote in this precinct, however, and Mr. Cole finished sixth among seven candidates, with 13.9 percent of the votes cast.

20. Another interracial election in 1992 was a mayoral contest in the Town of Benton. Votes in this election were also cast in a single precinct, so again no estimates of the racial breakdown in the vote can be provided. African Americans constituted 38.3 percent of the people signing in to vote in this precinct, and the African American candidate, Thelma Harry, received 36.2 percent of the votes cast.

21. In October of 1991, African American candidates competed with white candidates for the District 7 seat on the parish Police Jury, and for the mayoralty in Haughton. District 7 for the Police Jury consisted of five precincts. Precinct election returns indicate that the African American candidate in that contest, Leonard Kelly, was the choice of neither the African American voters nor the white voters. A regression analysis of the five precincts in this election produces an estimated vote for Kelly among African Americans of 41.5 percent, and among whites of 33.8 percent. The correlation coefficient for the relationship between the percentage of the votes received by Kelly and the racial composition of the precincts is .270. This coefficient is not statistically significant. Only two precincts were racially homogeneous; both were white precincts in which Kelly received 38.3 percent of the votes. (The only other African American candidate for a seat on the Police Jury in 1991 was Jerome Darby, an incumbent seeking reelection in District 10. There was no election in this district, however, as Mr. Darby was unopposed.)

22. The other election in 1991, that for the mayoralty in Haughton, was held in one precinct, so once again no

racial breakdown of the vote can be estimated. African Americans constituted 25.4 percent of those signing in to vote in this precinct, and the African American candidate in this contest, Mark Hill, finished last among three candidates, with 10.8 percent of the votes.

23. In summary, the only parishwide election in recent years in which the voters in Bossier Parish had a choice between an African American and a white candidate for a local office, the 1988 election for a seat on the 26th Judicial District Court, resulted in the voters being clearly divided along racial lines. Had only the votes of the African American voters been counted in that election, Bobby Stromile, the African American candidate, would have won that election. Stromile, however, was vetoed by the white voters of the parish. African American voters likewise would have elected Johnny Gipson to the school board in 1990 and Jeff Darby to the school board in 1986. These candidates were also vetoed by the white voters in those elections. In all three of these elections, therefore, voting was "racially polarized." While it is impossible to determine, given the limited data, whether Jerome Blunt was the candidate of choice of the few African American voters in the District K election for the school board in 1993, it is without question that he also was not the choice of the white voters in that election.

24. All of the other African American candidates competing in interracial elections in areas throughout the parish during the 1990s also lost. Data limitations preclude a determination of who the choice of African American voters was in all but two of these elections, the District 2 contest in Bossier City in 1993 and the District 7 Police Jury election in 1991. In the first of these elections, the African American candidate, Jeff Darby was an incumbent favored by the African

American voters in the district. He was defeated, however, by the white voters. In the Police Jury contest, the African American candidate does not appear to have been favored by either racial group. While the data for the District 1 election in Bossier City in 1993 do not allow one to determine who the choice of African American voters was, it is without question that the African American candidate, Will Jones, was not the choice of white voters. The remaining three elections were held in only a single, mostly white precinct, and in all three the African American candidates were likewise defeated.

25. Given the differences in the candidate preferences of the African American and white voters in Bossier Parish revealed in the analyses reported above, I must conclude that African American voters are likely to have a realistic opportunity to elect candidates of their choice to the Bossier Parish School Board only in districts in which they constitute a majority of the voting age population.

I declare, under penalty of perjury, that the foregoing is true and correct. Executed on December 8, 1994.

/s/ RICHARD L. ENGSTROM
RICHARD L. ENGSTROM

[Engstrom vita attached to U.S. Exh. 107 omitted from J.A.]

Excerpts from Defendant-Intervenors' Exhibit B (Final Direct Testimony of Defendant-Intervenor George Price dated April 9, 1995)

* * * *

[8]

17. On September 24, 1992, approximately 40 black citizens from various parts of the community attended the public hearing on redistricting. About 4 or 5 persons spoke against the plan on behalf of our coalition. I attended this meeting and was one of the speakers. All of these speakers spoke in favor of adoption of a plan that resembled the NAACP proposal and contained two majority black election districts. Not one person present at the public hearing spoke in favor of adoption of the Police Jury plan. The NAACP Redistricting Project had sent me a memo which I could use as the basis of my presentation to the Board. That memo is attached as Defendant-Intervenors' Exhibit 10. My presentation to the School Board covered all of the points in the memo as I basically read it to the Board. I again repeatedly emphasized that federal law should prevail over state law and that they could not ignore the Voting Rights Act over concern about precinct lines. I told them that the precinct law should not infringe on any citizen's right to vote. I told them that Joiner wasn't a lawyer and was wrong in what he told them. The School Board members listened to the comments of our representatives, with some of them occasionally stating that they couldn't do anything because of the problem with the precinct lines. The Board took no action at the hearing but just adjourned after hearing the comments from the public.

Excerpts from Defendant-Intervenors' Exhibit B (Supplemental Testimony of Defendant-Intervenor George Price dated April 9, 1995)

* * * *

28. Sometime after the School Board had submitted its proposed redistricting plan to the Department of Justice, I had lunch with the Board president at the time, Barry Musgrove. A local minister, Reverend John Dansby joined us. I remember this meeting in particular because we ate at the University Club in downtown Shreveport, near Mr. Musgrove's office. I had been continuing to encourage the School Board publicly and some School Board members privately to consider a redistricting plan with some black majority districts. Mr. Musgrove told me at this lunch meeting that there "just was not anything he could do" to get the Board to consider such a plan. He did not mention anything about splitting precincts or about the shape of black majority districts, but explained that "the votes simply were not there." He said that, while he sympathized with the concerns of the black community, there was nothing more he could do for us on this issue because the Board was "hostile" toward the idea of a black majority district.

29. I also recall a discussion sometime in 1993 with another School Board member, Thomas Myrick. Several Board Members had met with several representatives of the black community to discuss some of our concerns about the operation of the School District. The meeting was fairly tense. After the meeting, Thelma Harry and I had a discussion with Mr. Myrick. One of the issues that had come up in the meeting was the fact that Plain Dealing High School, a predominantly black school in Mr. Myrick's district, was the only Bossier Parish high school not to receive computers with certain dedicated

revenues received by the Board. Mr. Myrick was angry and said that he was doing the best he could do. He then asked us why we wanted "his seat." He said that he had worked too hard to get that seat and that he would not stand by and "let us take his seat away from him."

[NAACP letterhead omitted]

March 25, 1992

Mr. W. T. Lewis
Superintendent, Bossier Parish School System
School Board
P.O. Box 218
Benton, Louisiana 71006

Dear Superintendent Lewis:

It is my understanding that the Bossier Parish School Board is in the planning stage of reapportionment of school districts in Bossier Parish. If that is true, I would like to be included in all phases of the plan, and be place[d] on the list to be notified whenever this issue is discussed.

I understand that in accordance with Federal rules because there are no minorities on the School Board, I would like to represent a portion of the community in this process.

I look forward to hearing from you concerning this matter in the very near future.

Respectfully yours,

/s/ GEORGE PRICE

GEORGE PRICE
President, Bossier Parish NAACP

[NAACP letterhead omitted]

August 17, 1992

Mr. W. T. Lewis, Superintendent
Bossier Parish School System
School Board
P.O. Box 218
Benton, Louisiana 71006

Dear Superintendent Lewis:

In a previous letter dated March 25, 1992, a request was made to you concerning the reapportionment of school districts in Bossier Parish. In that letter the Bossier Parish Branch NAACP requested to be included in the reapportionment process and to this date, August 17, 1992, we have not received a reply from your office. It is now our understanding that this process is nearly completed. We regret this. Therefore, we advise you that the Bossier Parish Branch NAACP will be in opposition to the continuation of school districts that do not fairly represent all parish citizens.

We further request that the Bossier Parish Branch NAACP be allowed to come before the Bossier Parish School Board and present our views on the issue. As you know there are no Blacks on the School Board nor has there ever been. We are very concerned about this and feel that this issue must be addressed in the reapportionment process in order to create a School Board that represent the ethnic make-up of the Parish.

We look forward to working with you and the demographer in order to create districts that provide fair opportunity for anyone desiring to participate in the democratic process that select members for the School Board.

Because of the progress already made in this matter, we look forward to hearing from you within the next ten working business days.

Respectfully yours,

/s/ GEORGE S. PRICE

GEORGE S. PRICE, President

Bossier Parish Branch NAACP

September 18, 1992

Mr. David Harvey
President, Bossier Parish School Board
P.O. Box 2000
Benton, Louisiana 71006-2000

In Turn: Mr. W.T. Lewis
Superintendent, Bossier Parish Schools
P.O. Box 2000
Benton, Louisiana 71006-2000

Dear Mr. Harvey:

We, Citizens of Bossier Parish, requested that you as our elected officials, develop and establish three black school board districts that will greatly increase the possibility of minorities to be elected and represented on the Bossier Parish School Board. We believe that any plan that does not provide for fair and true democratic representation for all citizens should not be approved by this board.

We request that you give the plan submitted by the NAACP your upmost consideration and that you use it as a foundation to create black minority districts. All parish citizens must be represented in the democratic process which governs our schools and by having them included, we create a school system that is strong, effective and impartial.

Therefore, we urge you to reject any plan that does not provide true representation for all citizens of the parish. This does include rejection of districts that parallel with existing or recommended lines of the election districts of the Bossier Parish Police Jury.

Respectfully submitted:

/s/ GEORGE S. PRICE
GEORGE S. PRICE
NAACP
Men's Club of Bossier

/s/ JERRY HAWKINS
JERRY HAWKINS
Concerned Citizens
Men's Club of Bossier

/s/ JAMES ABRAMS
JAMES ABRAMS
Voters League

/s/ MARY WIGGINS
MARY WIGGINS
Bossier Housing Tenant Coalition

/s/ ANDREW DAVIS
ANDREW DAVIS
Concerned Parents of Plain Dealing

NAACP REDISTRICTING PROJECT MEMORANDUM

To: George Price, Bossier Parish NAACP

From: Samuel L. Walters, Assistant General Counsel
Ian Millett, Redistricting Analyst

Date: September 24, 1992

Re: Redistricting of Bossier Parish School Board
NAACP Proposal for Election Districts
"Legal Opinions" Given to Board by Gary Joiner

In light of our recent conversation in which you informed me of the proceedings before the Bossier Parish School Board, I wish to provide you with the following information which you can use in advocating your position before the Board. Some of these points have been made by you before, but it might be useful for you to have received the information from a lawyer since no attorney is stepping forth to tell the Board the undisputed principles of law that should control the redistricting of the Board.

1. The laws and Constitution of the United States are superior to those of Louisiana or any other state.

The laws and Constitution of the United States are always supreme to those of the various states. The Louisiana law stating that election districts must be created from whole precincts must give way to the requirements of the Voting Rights Act and the U.S. Constitution. While it might be true that adoption of school board district lines that cross existing precinct lines is a violation of that Louisiana law, that is not a sufficient justification for violating Federal law. In all likelihood the oath of office taken by each of the current school

board members included a pledge to uphold the laws and Constitution of the United States. The current board members should be mindful of this. The law requiring use of precincts is not in and of itself illegal, but it is a violation of the Voting Rights Act if its implementation causes dilution of the minority vote. Such is clearly the case in Bossier Parish.

Terrebonne Parish tried to use this argument to avoid creating a majority black district and our challenge to the Justice Department resulted in them having to redraw their lines to create a third district. These districts were created using census blocks.

2. Mr. Gary Joiner is a map drawer, not a lawyer, and his attempts at giving legal advice should be treated accordingly.

It seems that the local lawyers are abdicating their responsibility to provide the board with sound legal advice and are letting Mr. Joiner step into this vacuum and give "legal evaluations" of the various plans now before the board. Mr. Joiner is not a lawyer and is not aware of all of the legal ramifications of these evaluations. Furthermore, the evaluations are simply wrong. However, what is more disturbing is the fact that Mr. Joiner knows that the law is contrary to the opinions he is giving to the board. He and I have had conversations where he acknowledged that using the whole precinct law in this case and several others prevents or impedes the creation of a majority black district and thus constitutes a violation of the VRA. He also understands the concept that Federal law is supreme.

3. The fact that the Justice Department precleared the earlier plan does not in anyway mean that the School Board's submission of the same district lines will be precleared or that they will withstand a lawsuit.

The Police Jury plans were precleared without any opposition. Since there were no presentations of alternate maps showing that other configurations offered more empowerment opportunities for the black community, the Justice Department probably didn't look at the Police Jury lines too hard. If the School Board persists and passes the same district lines, they can be assured that the NAACP Redistricting Project will assist the local Branch and have a letter of opposition and the alternate maps to the Justice Department before the Parish's submission is even in to Justice.

Even if the Justice Department were to preclear the same plan, such preclearance does not make the Parish immune from litigation. The Voting Rights Act specifically states that Justice Department preclearance under Section 5 does [*sic*: not] determine the outcome of litigation filed under the more general provision of Section 2, nor does it preclude the filing of such litigation.

Excerpts from Defendant-Intervenors' Exhibit B (Final Direct Testimony of Defendant-Intervenor Thelma Harry dated April 9, 1995)

* * * *

[7]

16. On several occasions in recent years, the NAACP has presented the School Board with a list of concerns about the operation of the school system. These lists have been developed from meetings of the executive committee of the NAACP where we tried to take all of the many complaints we had received about the school system and put them into categories. Most of these lists have contained the same problems over and over as no action ever seems to be taken to solve the problems. After one time when we presented them with a list of some of our complaints, the School Board set up a Community Affairs Advisory Council in early 1993. This was to be a committee of six people selected by the NAACP and six people selected by the School Board. I was one of the representatives selected by the NAACP. There were two preliminary meetings to establish the Council and its membership. Then regular meetings were to be held monthly. After only one regular meeting, we received a letter, dated March 16, 1993, stating that the School Board had cancelled the Council. A copy of the letter that I received from the School Board announcing the disbanding of the committee is attached as Defendant-Intervenors' Exhibit 17 [omitted from J.A.]. We were also told that the Council had to be canceled because there was already a Bi-Racial Committee established by the consent decree from the school desegregation suit and this one would be illegal. We were angered and disappointed at the cancellation of the Council, but we were not really surprised as it seems that the School Board and school system do not really

want to deal with the problems that face the black students and parents. Many of us had no knowledge that there was any such Bi-Racial Committee in existence with which the Council could have conflicted. Then we found out that the annual reports which the School Board had been sending to the Court and the Department of Justice left the impression that the original Bi-Racial Committee was still functioning when in fact it had not met in years. This made the leadership and membership of the NAACP and other groups very disappointed and angry.

Excerpts from Defendant-Intervenors' Exhibit E (Supplemental Testimony of Defendant-Intervenor Thelma Harry dated April 9, 1995)

* * * *

19. After one of the meetings of a group of NAACP members and a few school board members in 1993 (see paragraph 17 of the Final Direct Testimony of Thelma Harry), Mr. George Price and I had a conversation with Mr. Tom Myrick. Things in meeting itself had been somewhat on edge because it was clear that the representatives of the black community were not going to be satisfied by more promises to look into problems, but wanted concrete steps taken to solve the problems. During this meeting, one of the issues we had raised was the fact that the Plain Dealing High School was the only high school in the parish that did not get any money for computer purchases from a program called BEEF. Plain Dealing is in the northern part of the Parish in Mr. Myrick's district. It is the only majority black high school in the parish. After the meeting, Mr. Myrick complained that we were always trying to take his seat and stated that he was not going to let us take it away from him.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 94-1495
(LHS (USCA), CRR, GK)

BOSSIER PARISH SCHOOL BOARD, PLAINTIFF

v.

JANET RENO, DEFENDANT

v.

GEORGE PRICE, ET AL.
DEFENDANT-INTERVENORS

DIRECT TESTIMONY OF DAVID CREED

1. My name is David Arnold Creed. I am the Director of North Delta Regional Planning & Development ("North Delta") in Monroe, Louisiana. I have held this position for 14 years.

2. North Delta provides technical assistance and demographic advice to governmental bodies throughout the northeastern Louisiana region.

3. One of the services we provide is consultation concerning, and the development of, reapportionment plans. We draw redistricting maps and precinct maps for school boards, parishes, and municipal governments in Louisiana. In addition, I testified in the lawsuit of *Knight v. McKeithen*, No. 94-848-A. 2 (M.D. La. August 19, 1994), on behalf of the defendant East Carroll School Board.

4. As a result of our redistricting work I am familiar with the requirements of both federal and state law concerning reapportionment in Louisiana. In particular, I am familiar with the preclearance requirements Section 5 of the Voting Rights Act and with Act 925, the Louisiana Statute limiting the ability of local school boards to alter precinct lines.

5. Over the past two years, I have worked with several governmental entities on reapportionment projects which have involved potential conflicts between the Voting Rights Act and the precinct-splitting law. In none of these situations have the limitations on a school board's ability to split precincts prevented the adoption of a redistricting plan that met the requirements of Section 5.

6. For example, we worked with the West Carroll Parish School Board in developing its redistricting plan. West Carroll was unable to develop a reapportionment plan which met the requirements of the Voting Rights Act without splitting some precinct lines. However, after the Department of Justice precleared West Carroll's plan it was able to satisfy state law requirements by having the West Carroll Police Jury, the parish governing body, alter existing precinct lines.

7. Likewise, we worked with the Franklin Parish School Board, whose situation was similar. Franklin needed to split precincts to satisfy Section 5 requirements. We helped the Franklin Parish School Board develop new precinct maps and descriptions which it submitted to its police jury for approval.

8. In both West Carroll and Franklin Parish, the school boards paid the police juries' costs in establishing new precinct lines, which amounted to one or two thousand dollars in each case. Once the school boards agreed

to cover these costs, the police juries expressed no further reservations about adopting the precinct changes necessary for the school boards to implement election plans in compliance with federal law.

9. We also worked with the Ouachita Parish Police Jury and Registrar of Voters in drawing and describing new precincts for use by the Monroe School Board, a metropolitan district within Ouachita Parish.

10. Although municipal governments in Louisiana, as opposed to school boards, are not governed by the restrictions of Act 925, they also frequently have to rely on parish governing bodies, usually the parish policy juries, to alter precinct lines. For example, many small municipalities with single member districts have more seats in municipal elections than there are regular precincts within the borders of the municipality. This is another occasion in which police juries are frequently called upon to "split" precincts.

11. Such precinct-splitting raises few practical difficulties. To establish new precincts requires new maps, legal descriptions, and a resolution by the parish governing body. To implement them requires new polling places, or more simply the use of lockouts or additional machines at existing polling places. These efforts were the principal sources of the costs identified in paragraph 8 in West Carroll and Franklin Parishes.

12. Police juries and school boards in Louisiana also frequently adopt different single-member election districts. For example, five or six of the 11 parishes in my planning district have different election plans for school board and policy jury.

13. In sum, while I have observed several instances of apparent tension between the requirements of Section 5 of the Voting Rights Act and Louisiana's precinct-split-

ting statute, this tension has been fairly easily resolved by several school boards with which I am familiar.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 16th day of February, 1995 in the City of Monroe in the Parish of Ouachita, State of Louisiana.

/s/ DAVID ARNOLD CREED

DAVID ARNOLD CREED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 94-1495
(LHS (USCA), CRR, GK)

BOSSIER PARISH SCHOOL BOARD, PLAINTIFF

v.

JANET RENO, DEFENDANT

v.

GEORGE PRICE, ET AL., DEFENDANT-INTERVENORS

SUPPLEMENTAL TESTIMONY OF DAVID CREED

14. I heard Mr. Joiner testify that he informs school boards of all of their redistricting options. I also do the same. This includes informing them about Act 925, the Louisiana statute limiting precinct splits by school boards. In helping to prepare redistricting plans based on the 1990 census, I also informed school boards that one of their options was to adopt a plan splitting precincts and ask the police jury to establish the necessary new precincts. I also informed them that if they adopted a plan with a number of seats different than the police jury, that they had the ability themselves to establish some new precincts prior to December 31, 1992.

15. In addition, I informed school boards about the Voting Rights Act, including the possibility that its requirements may conflict with Act 925. I informed clients that in such a situation federal law prevails and

claiming that they are unable to split precincts is not a valid excuse. I would not consider myself to have done my job as a consultant if I had not informed them of this matter and others.

16. I heard Mr. Myrick and Mr. Musgrove say that they relied on Mr. Joiner's statement that they could not split precincts. In my experience, this would be unusual. Board members normally ask many questions, are nearly always concerned about incumbency, and usually direct me to prepare a plan different than what I originally recommend. This is also the case with my colleagues in the other Planning and Development Districts around the state of Louisiana. For example, when I initially told the West Carroll Parish School Board that they likely would need to have a black majority district, some individual board members told me that they did not wish to be "blamed" for this and that if they had to, it would be better if it were construed to be forced by the "federal government." As I testified in my original direct testimony, this happened.

17. I heard Mr. Joiner testify about his estimates of the cost of holding elections with additional precincts. In my view, his estimates represent total costs and not costs to the local school board. Furthermore, they represent a worst case scenario in terms of total costs because they:

(1) assume separate election commissioners and supervisors for every precinct;

(2) assume that lockouts could not be used; and

(3) assume that police juries would not reconsolidate precincts.

All of these assumptions are unlikely.

18. Mr. Joiner's rebuttal testimony misses the point of my direct testimony concerning municipal elections in Louisiana. That point is that police juries in virtually all sixty-four of Louisiana's parishes have to deal with precinct splitting by municipalities. While this splitting is not prohibited by state law, it still requires local government bodies to incur the same costs and inconveniences of precinct splitting that school boards do when they must ask police juries to split precincts.

19. I heard Mr. Joiner testify about his concern about precinct splitting. In my work, I am called upon to help governmental bodies develop precinct lines. Precincts are drawn largely based on geographical concerns rather than demographic characteristics of the population. They vary widely in the number of voters per precinct and are somewhat arbitrary.

20. I disagree with Mr. Joiner's definition of gerrymandering. To me there is a difference between attempting to draw a black majority district and racial gerrymandering. The difference is that gerrymandering involves drawing voting districts in a tortuous or convoluted way in order to render contiguous pockets of minority population that cannot be connected consistent with normal redistricting principles.

21. I recently was shown the Bossier Parish School Board's proposed redistricting plan and the illustrative plan developed by Bill Cooper without being told which was which. In my opinion, neither contains districts that appear to be gerrymandered. Furthermore, I concluded that neither plan on the whole was any more "gerrymandered" in its appearance than the other. Both appeared to have districts that were sufficiently compact and contiguous.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 10th day of April 1995 in the Washington, D.C.

/s/ DAVID ARNOLD CREED

DAVID ARNOLD CREED

Excerpts from Volume I of Trial Transcript in *Bossier Parish School Board* v. *Reno*, C.A. No. 94-1495 (D.D.C.), April 10, 1995

Testimony of Plaintiff's witness Barry Musgrove—Cross Examination by the Defendants

* * * *

[41]

* * * *

Q. And you are aware, are you not, that Police Juries can change precinct lines once they have been established?

A. Basically I understand that, yes, ma'am.

Q. And there is certainly no state law requirement that would prohibit a School Board, just as any other member, or any citizen of Bossier Parish, for that matter, from requesting of the Police Jury that they change there precinct lines?

A. Restate, please?

Q. You are not aware, are you, of any state law requirement that would prohibit the School Board, or any citizen of Bossier Parish, from requesting that the—of the Police Jury that they change their precinct lines?

A. I am not aware of any such law, no, ma'am.

Q. And, in fact, that does, indeed, happen from time to time, are you aware of that?

A. I would assume so, yes, ma'am.

Q. So you would agree with me would you not, Mr. Musgrove, that there is no reason why a School Board could not develop its own redistricting plan, and if it split precincts, then go to a Police Jury with a request to

reconfigure its precincts to accommodate that plan?

MR. THORNTON: Objection, Your Honor.

THE COURT: Overruled.

[42]

MR. THORNTON: She said —

THE COURT: Overruled. Overruled.

THE WITNESS: Ms. Sardeson, I am comfortable with addressing the Bossier situation, but I am not real comfortable addressing any other parish situation. I assume that any parish can do anything that they have a desire to do.

But in our situation, our initial hope was to jointly develop a plan between the two public bodies, and when that did not come to fruition, the Police Jury said that they were going to do their own thing, and when that went out the window, then we proceeded in the other direction of retaining Mr. Joiner.

BY MS. SARDESON:

Q. My specific question to you, and I will put that in Bossier Parish then. You are not aware of any state law requirement, are you, that would have prevented the School Board, the Bossier Parish School Board, from developing a redistricting plan, or discussing developing a redistricting plan that split precincts, and if it did that going to the Police Jury to—and requesting it to reconfigure the precincts to accommodate that plan?

A. Ms. Sardeson, my response would be that my understanding, and certainly I am not a lawyer, but my understanding was that that would have been possible if we [43] jointly worked on developing precincts, but that once the Police Jury established their lines, then we were obliged to operate within the precinct lines so established by their rules.

Q. So it is your understanding that the Police Jury can't split precincts?

A. Well, I have—I have two feelings on that. One, we operated under the premise that only they could—had the authority to split precincts. Since that time, you know, I have had information from several sources that perhaps the state law prohibiting the violation of precinct lines also applies to the Police Jury.

But at the time that we were negotiating or considering all plans, it was my understanding that the Police Jury was the only body that had the authority to violate precinct lines, yes, ma'am, or to redraw. Did I—am I answering your question?

Q. Was it your understanding—are you saying that it was your understanding during the time leading up to the School Board adopting the Police Jury plan that it was not possible for the School Board to go to the Police Jury and request that the Police Jury reconfigure its precinct plan?

A. Well, I personally did not know that that was an option until after our plan had been denied by the Justice Department.

[44]

Q. But you know that that is an option today?

A. That?

Q. Do you know that the option of going to the Police Jury to request that they reconfigure their precinct lines—

A. Yes.

Q. —was an option at that time? You understand that today?

A. Yes, ma'am.

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[47]

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Q. In fact there was no discussion about the NAACP plan after Mr. Joiner said that it split precincts, isn't that true?

A. From my viewpoint, yes, ma'am.

Q. You also stated in your direct testimony that after the Justice Department denied preclearance to the School Board's redistricting plan, we were further told that we were not permitted to gerrymander for racial purposes, is that correct?

[48]

A. Restate, please?

Q. You stated in your direct testimony that after the Justice Department denied preclearance to the School Board's redistricting plan, and I quote from your direct testimony, we were further told that we were not permitted to gerrymander for racial purposes?

A. Well, if you are reading, then I assume that I said that. I believe that what I intended to convey is, again, violating of existing precinct lines by state law to gerrymander any district, whether it be for majority or minority purposes.

Q. Are you making a distinction between the precinct splitting problem and racial gerrymandering? Would you make a distinction between those two definitions?

A. Based on my knowledge I cannot make a distinction. Gerrymandering, my concept of the word is that it is an illegal use of precinct lines to configure a district that will favor either a majority or a minority situation. I have a hard time distinguishing between the two personally.

Q. Well, you stated earlier in your direct testimony that Mr. Joiner had told the board that there was a problem that the NAACP split its precincts, is that correct?

A. That is correct.

Q. And that you also stated that that was the reason why you—for you, the NAACP plan wasn't an alternative for the [49] School Board to adopt?

A. The night that it was presented, the president of the board at that time, David Harvey, asked Mr. Joiner to come in, and his response was that the plan was illegal because it violated numerous existing precinct lines that we had no authority to do. I might—may I?

James Bullers was the District Attorney who was acting as our counsel, also made the comment at that time that he agreed that should we adopt that plan that we would be sued.

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[59]

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Q. Mr. Musgrove, you identified the *Lemon* case as the district school desegregation case a few minutes ago. Isn't it true that you know virtually nothing about the school district's obligations in that on-going school desegregation case?

A. Yes. That is essentially true. I really had not heard about that case until we were called to Baton Rogue last year.

Q. You were called to Baton Rogue because my client sued the School Board to try to get it to adopt a legal redistricting plan?

A. Yes, ma'am.

Q. I would like to go back for a moment to this question of precinct splitting versus racial gerrymandering. Are you familiar with the old Bossier area of Bossier City in the parish?

A. In general, yes, ma'am.

Q. Isn't it true that in that area of Bossier City, if it weren't for the precinct issue, you think that a majority black district could probably be drawn without a [60] gerrymandering issue?

A. Restate, please?

Q. Isn't it true that in the old Bossier area of Bossier City, even if it weren't for the precinct issue, you think that a majority black district could be drawn without a gerrymandering issue?

A. If it weren't for the precinct issue?

Q. That is right?

A. Though I am not a demographer, I am aware that that area houses the most significant concentration of minority population, and as a lay person common sense would tell me that that would be as close a potential black majority district as could be constructed.

* * * *

Testimony of Plaintiff's witness Thomas D. Myrick—Cross Examination by the Defendants

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[73]

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Q. You also said in your direct that there were two schools actually physically located in your district?

A. Yes.

Q. And that—both of those schools are up in Plain Dealing, are they not?

A. Yes. Plain Dealing Elementary School, and then Plain Dealing Middle School and High School are in one location.

Q. And both of those schools are predominantly black, are they not?

A. Yes.

Q. And in fact both of those schools are over 75 percent black?

A. I couldn't answer that. I do know that they are predominantly black.

Q. Again, it has been stipulated in this case that Plain Dealing Elementary is 77.7 percent black, and Plain Dealing [74] Junior and Senior High is 76.9 percent black.

A. I would not disagree with that.

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[78]

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Q. But isn't it true, Mr. Myrick, that you actually participated in the Police Jury process?

A. No, absolutely not. I had nothing whatsoever to do with it.

Q. That, in fact, you met with Mr. Joiner, the Police Jury's demographer, in his office on five or more occasions during the Police Jury process?

A. I did not.

THE COURT: Where was his office?

MS. SARDESON: In Shreveport.

THE COURT: I asked—I didn't ask you.

MS. SARDESON: I am sorry.

THE COURT: Where was his office?

THE WITNESS: I do not know where his office is. I have never—

THE COURT: Have you ever been in Shreveport, Louisiana?

[79]

THE WITNESS: Yes, sir.

THE COURT: Have you ever been in his office?

THE WITNESS: No, sir.

THE COURT: Are you sure about that?

THE WITNESS: Absolutely.

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[86]

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Q. Mr. Myrick, you stated in your direct testimony

that it was likely you who proposed, shortly after the Department of Justice precleared the Police Jury plan, proposed to the School Board that they adopt the Police Jury plan?

A. Yes.

Q. Just go ahead and—

A. It probably was. I know that I favored it. I don't recall specifically making the motion, but that was my position.

Q. And the reason for your position, was it not, that you were afraid that the members of the School Board were going to become embroiled in a political controversy over the fact that incumbents were pitted against each other?

A. My position was that this plan had been approved by the [87] department—or had been not objected to by the Department of Justice. It seemed expedient to say that if this plan is acceptable, then why don't we accept it rather than become involved in discussions about minute changes in district lines.

It seemed a good way to say, we don't have anything else to worry about. This plan has been accepted, and we had no objection to it. And I will add, also, that a part of my thinking in the process was that it was more reasonable for the public to understand the district based on it being the same as the Police Jury.

In the past, prior to 1980 as I recall, the—both plans were the same, and the district designation was the same. Between 1980 and 1990 there was much confusion about which Police Jury district you lived in and what School Board, among the voters is what I am saying.

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[105]

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Q. Isn't it true that Mr. Price then brought his plan back before the board at the next School Board meeting on September 17th, 1992, do you recall that, the two presentations?

A. I think that that is correct.

Q. And isn't it also true that the School Board just dismissed the plan because of split precincts?

A. We chose to go with the Police Jury plan because it had [106] been approved by the Department of Justice.

Q. But it would be a fair statement, wouldn't it, in light of the comment that you just made, that you didn't even take—give the plan enough thought to find out where your own residence would be in that plan, that the School Board just summarily dismissed the NAACP plan when Mr. Price presented it?

A. I cannot speak for the whole board, but I did not summarily dismiss it.

Q. But the School Board didn't ask Mr. Joiner to conduct any further study on the plan after Mr. Price presented it, did they?

A. Mr. Joiner told us that the proposed NAACP plan split precincts. In fact he gave us a number, that I can't recall now, but it was a pretty high number.

THE COURT: Did anybody present to you during this period a plan whereby minorities would be in the majority of any election district without cutting precinct lines?

THE WITNESS: No, sir.

THE COURT: Nobody?

THE WITNESS: No, sir.

THE COURT: Including the NAACP or any other minority group?

THE WITNESS: No, sir.

THE COURT: Are you sure about that?

[107]

THE WITNESS: That is my understanding.

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[109]

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THE COURT: Was Mr. Price a part of the redistricting process of the School Board of which you are a member?

THE WITNESS: He contributed on a number of occasions and provided a proposed plan.

THE COURT: Did they cut across precinct lines?

THE WITNESS: Yes.

THE COURT: What was the reason that they were rejected?

THE WITNESS: That was one of the reasons, Your Honor.

THE COURT: What were the other reasons?

THE WITNESS: The other reason, in my opinion, was that the district was configured in a real odd way, beginning at the Arkansas state line, and extending on

down through the middle of the parish, and it created a School Board district that was not in accord with the previous practices.

Our—our procedure has always been for a School Board member to represent a certain area, and the districts that Mr. Price proposed flashed down through the middle of the parish and created a situation where a School Board member in Bossier City or the southern part of the parish would be representing people who attended a school and [110] resided in the northern part of the parish.

It would distance the voting public in a particular school attendance district from their School Board member, and that was my personal objection to it. And then we were informed that that plan could not be created with a black majority district without crossing precinct lines.

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[114]

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Q. And Mr. Price addressed the precinct split issue in the NAACP plan at that public hearing, did he not?

A. I have heard him address it, and I am not certain that it was at that particular time.

Q. In fact Mr. Price talked about the supremacy clause in his presentation, did he not?

A. I don't think that he used that term.

Q. Isn't it a fact, Mr. Myrick, that Mr. Price told the board that Mr. Joiner, the School Board's own demographer, had had conversations with the NAACP, and that Mr. Joiner had admitted that the use of the precinct law

—the state—the Louisiana precinct law, if it impeded the creation of a black majority district, that that would constitution—constitute a violation of the Voting Rights Act, a constitution of federal law?

A. I don't recall that. I recall Mr. Price's statement to the effect that federal law supersedes the state law.

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[127]

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Q. Mr. Myrick, I put back up what was marked as United States exhibit number 76-D, which is the proposed School Board plan, which is the current Police Jury plan?

A. Yes, it appears to be.

Q. Which district does Tommy Scarborough represent?

A. The blue one.

Q. That is the same as the one that you would be in if the court approves this plan for the School Board—

A. Yes.

Q. —is that correct?

A. Correct.

Q. And which district is Rick Avery in?

A. I couldn't tell you. I have no idea. I can—

Q. I am sorry, go ahead.

A. I think that I know—I couldn't answer that. I thought that I could tell you where he lived, but I don't —I am not certain of that.

Q. Mr. Myrick, would it help you to remember the conversations that Ms. Sardeson was asking you about with Mr. Joiner during the Police Jury process in which she asked if you were involved, if I were to suggest to you that Rick Avery and Tommy Scarborough were involved in some of those conversations as well?

A. With me?

[128]

Q. And with Mr. Joiner during the Police Jury redistricting process?

A. No.

Q. Would it help—

A. That is not true.

Q. Does it help you recall those conversations if I suggested that in paragraph eighty-five of the stipulations that your counsel has stipulated that on those occasions you were accompanied by at least two Police Jury members, Rick Avery and Tommy Scarborough, all of whom represent districts, portions of which could be used to create a black majority district north of Bossier City?

A. I never met with a member of the Police Jury. I never discussed the plan with them. I have never met with Mr. Joiner outside a School Board meeting to discuss this reapportionment plan.

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Testimony of Plaintiff's witness Gary D. Joiner—Cross Examination by the Defendants

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[135]

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Q. And you incorporate that input from your employers when you are drawing the plan, isn't that correct?

A. Yes.

Q. You don't inject your own personal preferences into the plan, do you?

A. No.

Q. So when you are drawing a redistricting plan, you follow the instructions of the government officials who employ you, [136] that is fairly stated, correct?

A. Yes. Unless—occasionally something happens when an elected official will ask me to do something that is just totally improper, and it happens rarely, but it does happen occasionally.

Q. And you advise them of all of the relevant state law requirements?

A. Yes.

Q. And you also advise them of all relevant options for redistricting under state law, isn't that correct?

A. Yes.

Q. Now, you had these meetings with small groups of individual incumbents during the Bossier Parish Police Jury redistricting process in 1991, correct?

A. Yes.

Q. And it has been stipulated to by the parties in this case that these meetings were not open to the public. Now let me ask you this question about these meetings. School Board member Thomas Myrick, one of the plaintiffs in this case, attended some of these meetings, did he not, during the Police Jury process?

A. Listening to testimony—if I could I would like to explain what I remember.

THE COURT: Answer the question.

THE WITNESS: I met with certain School Board [137] members, talked to them. Most of the Police Jury members came to my office, two or three at a time.

BY MR. MULROY:

Q. And Thomas Myrick—

A. I met with Mr. Myrick, and I thought that it was at my office. It may not be. I am not—I am not really sure about that, at my office.

Q. He met with you during the Police Jury redistricting process, correct?

A. I met Mr. Myrick.

Q. And discussed redistricting during the Police Jury redistricting process, isn't that correct?

A. But not in the School Board process, the Police Jury process for the Police Jury, and there is a difference.

THE COURT: There is?

THE WITNESS: Yes, sir.

THE COURT: Oh, might be.

BY MR. MULROY:

Q. So your testimony then, if I can understand it correctly—

A. Can I expand on that?

THE COURT: No. Answer questions.

BY MR. MULROY:

Q. Your testimony then is that School Board member Thomas Myrick met with you during the Police Jury redistricting [138] process to discuss the redistricting for Bossier Parish, is that fairly stated?

A. For the Police Jury, and he was certainly aware of it. Yes, I would say yes to that.

Q. Now, you did testify at deposition, did you not, that he met with you some five times in your office, did you not?

A. I don't recall. I certainly met with Mr. Myrick at various times, and other School Board members. I don't recall saying in my office. Maybe I did. I don't—of course I had almost twenty hours of deposition, too. I may have.

Q. Well, you did take a deposition in this case, is that correct, Mr. Joiner?

A. Yes, sir.

THE COURT: Just a minute, counsel. Witnesses don't take depositions. Witnesses submit to depositions.

MR. MULROY: I stand corrected.

THE COURT: Now let me show you how to do it. Bring it up here.

MR. MULROY: Bring the deposition transcript?

THE COURT: Yes.

MR. MULROY: Thank you, Your Honor.

THE COURT: Do you recall your deposition being taken on October 14, 1994?

THE WITNESS: Yes, sir.

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THE COURT: In this case, by Mr. Gary Joiner?

THE WITNESS: Yes, sir.

THE COURT: And you were under oath at that time, were you not?

THE WITNESS: Yes, sir.

THE COURT: And that was in the case of Bossier—

MR. MULROY: Bossier, Your Honor.

THE COURT: Bossier Parish School Board versus Jane Reno and others in this case, right?

THE WITNESS: Yes, sir.

THE COURT: Now at any time following the redistricting process for the Police Jury, did you have any discussions with any other member—any member of the School Board?

THE WITNESS: Yes, sir.

THE COURT: With whom did you have such discussions?

THE WITNESS: When I went before the School Board, I certainly discussed that with every member of the School Board. I recall having conversations with both Mr. Myrick and with Mr. Musgrove, and with the staff of the School Board.

THE COURT: Is it your testimony today that Mr. Myrick did not come to your office?

THE WITNESS: No, sir, it is not.

[140]

THE COURT: What is your testimony? Did he come to your office or didn't he?

THE WITNESS: I believe that he did. I certainly do. I couldn't tell you the dates, Your Honor. I am not sure about that.

THE COURT: The question that you discussed with Mr. Myrick in your office was the district boundaries that had already been created for election of the School Board before there was a vote, isn't that right?

THE WITNESS: I don't recall that, Your Honor. For the School Board?

THE COURT: For the Police Jury?

THE WITNESS: For the Police Jury. That would have made sense, yes.

THE COURT: Do you recall how many meetings that you had with Mr. Myrick?

THE WITNESS: No, sir, not offhand, but I would assume that over the course of the project probably half a dozen.

THE COURT: Ten?

THE WITNESS: It could be. I really didn't keep records of who I spoke with on any—at any given time.

THE COURT: All right. Did you have occasion to call him and seek him out?

THE WITNESS: I do not recall calling him. I [141] typically work through staff.

THE COURT: Did he ever have occasion to call or contact you directly?

THE WITNESS: Yes, sir. I believe that he did on at least one occasion. Yes. I will answer that yes.

THE COURT: When he came to see you was he concerned about his own district alone?

THE WITNESS: I would say that I have never been in a meeting with an incumbent when they were not concerned about at least where their boundaries were. And I would say that that would extend to Mr. Myrick.

THE COURT: He was concerned about his own district?

THE WITNESS: I would say so, yes. Whether he said that verbally or not, I don't know.

THE COURT: And he came to see you what the jury—the Police Jury plan would look like in terms of its boundaries?

THE WITNESS: I would say so, yes.

THE COURT: And he left you with the impression that the Police Jury plan would ultimately be the School Board plan, right?

THE WITNESS: Yes, sir.

THE COURT: Did you have any occasion to discuss with Mr. Myrick, or Mr. Jerome Darby, the Police Jury plan?

[142]

THE WITNESS: Yes, sir. I certainly spoke to Mr. Jerome Darby about it on several occasions.

THE COURT: Did either of them ever have any—give you any indication that they wanted a black majority district?

THE WITNESS: No, sir.

THE COURT: As a matter of fact they indicated just to the contrary, didn't they?

THE WITNESS: Yes, sir. In the context —

THE COURT: You answered my question.

THE WITNESS: Okay.

THE COURT: On how many occasions did you talk with Mr. Darby?

THE WITNESS: Several. I don't remember how many, but several. Both in meetings, before and after meetings, at my office. And by telephone.

THE COURT: Now wait a minute, sir. Did you have any individual conversations with members of the Police Jury about the drawing of black majority districts?

THE WITNESS: Individual conversations?

THE COURT: No. Any conversations with individual members of the Police Jury about drawing black majority districts?

THE WITNESS: Not that I recall.

THE COURT: All right, counsel. You can have this [143] back.

MR. MULROY: Thank you, Judge.

BY MR. MULROY:

Q. If I may just quickly follow up on one point that you just made, Mr. Joiner, as Judge Richey was questioning you. Police Juror Jerome Darby during the Police Jury redistricting process is a black Police Juror, is that correct?

A. Yes, he is.

Q. Mr. Darby didn't affirmatively tell you that he opposed the creation of a black majority district during the process, did he?

A. Oh, no.

Q. In fact he did ask about the possibility of creating a black majority district, did he not?

A. It was more involved than that.

Q. But the answer would be yes, he did ask about the posibility of creating a black majority district, is that correct?

A. Yes. The answer to that would be yes.

* * * *

[149]

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THE COURT: I asked you, what was the highest percentage of African Americans in a proposed district that you generated on your computer when considering alternatives for elections to the School Board?

THE WITNESS: In a complete plan it was probably not over thirty percent, thirty or forty percent.

THE COURT: How about Police Jury?

THE WITNESS: The same. I doubt that it was that high.

THE COURT: Would it be higher in the School Board? They are the same, aren't they?

THE WITNESS: Yes, they are. It would be the same.

THE COURT: Okay. So you got up to thirty or forty percent?

THE WITNESS: Maybe.

THE COURT: Well, maybe. Do you know? You did it, didn't you?

THE WITNESS: Yes, sir, but it has been a long time, and those plans were destroyed in a computer catastrophe in my office.

THE COURT: Well, did you give them—what program did you use? Autocad, or Word Perfect, or Microsoft Word, or what?

[150]

THE WITNESS: No. I used Geodistrict from Geographic Data Technology, and GIS Plus from Caliber Corporation, and the problem was that I was backing it up, so my back up was blown away when my—

THE COURT: Your back up was what?

THE WITNESS: My back up sort of self destructed.

THE COURT: Was it on tape or diskette?

THE WITNESS: Yes, sir, it was on tape.

THE COURT: What about the hard drive?

THE WITNESS: It went down, too. We had a power failure at the worse possible moment.

* * * *

[151]

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MR. MULROY: And just for the purposes of clarification, Judge, the United States does not dispute that it is impossible to draw two black majority districts to actually—

THE COURT: Impossible did you say? You don't want to dispute the fact that it is impossible to draw two black [152] majority districts?

MR. MULROY: Without splitting at least a single

precinct. We do not dispute that in order to go from the forty-five percent range up over to the fifty percent range for the two districts that it might be necessary to split a single precinct. It is our contention that there are ways for School Boards in Louisiana, including this School Board, to handle that situation, and that—

THE COURT: Without—by means of splitting just—not more than one precinct, is that right?

MR. MULROY: No. Actually Judge it is our—

THE COURT: How many precincts are going to have to be, quote, split, unquote?

MR. MULROY: To get one black majority district in the City of Bossier, fourteen.

THE COURT: All right. How many to get two?

MR. MULROY: Twenty-seven.

THE COURT: All right. Do you agree with that?

THE WITNESS: Yes, sir.

THE COURT: Are you the source of that information?

THE WITNESS: No, sir. They had someone else do it, but I verified it.

THE COURT: And you verified it on your computer?

THE WITNESS: Yes, sir.

THE COURT: Even though it crashed you still [153] remember?

THE WITNESS: That is after that.

* * * *

[155]

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Q. Would you agree with the statement that any plan at all, whether black majority districts or not, which in any significant way deviated from the Police Jury plan, would inevitably split at least one precinct somewhere?

A. I haven't done a test to test all of them. I don't think—I don't think that you—I know that you could not have another plan that was as strong as this one without splitting precincts.

[156]

Q. How long would it have taken you to figure out whether any other alternative, which is significantly different from the Police Jury plan, in any way, black majority or otherwise, was possible without splitting precincts?

A. Several hours at least.

Q. Several hours?

A. At least.

Q. All right. Now, when the School Board—strike that.

When the School Board began its redistricting process, it didn't consider it a foregone conclusion from the git-go that it would adopt the Police Jury plan during its 1992 process, is that correct?

A. That is correct, they did not.

Q. In fact it actively considered the idea of going with another plan, correct?

A. Yes.

Q. Indeed when the School Board first hired you in May of 1991, didn't you estimate that your redistricting work would take 200 to 250 hours?

A. If they wished to pursue another course, yes.

Q. Doesn't it necessarily follow that from the start the School Board was at least considering the idea of adopting a plan which split at least some precincts?

A. No.

Q. Now, as one of the reasons that the School Board has [157] given in this case for adopting the Police Jury plan over alternatives which provide black majority districts, the School Board stated that it had no authority to change precincts, is that correct?

A. Would you repeat that, please?

Q. Sure. When the School Board gave a reason for not adopting—for adopting the Police Jury plan over alternatives which provided minority districts, one of the reasons that it gave was that it had no authority to change precincts, is that correct?

A. Yes. Under Louisiana statute seventeen seventy-one three E two B, I think.

Q. And for that reason it did not give consideration to the NAACP plan as a viable plan, is that correct?

A. That is correct.

Q. But it has been stipulated to in this case that it is quite common for parish School Boards in Louisiana to draw a redistricting plan different from the respective Police Jury redistricting plan.

In fact, isn't it true that you testified at deposition that out of the nine plans that you have worked—nine parishes in which you have worked in which the School Board and the Police Jury had the same number of districts, five had different plans?

A. Yes, that is correct.

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[165]

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Q. Let me ask you this question. It was your practice to fully inform your clients, including the School Board, about all options that they would have, including options regarding the changing of precinct lines, is that correct?

A. Yes.

Q. And that would include—strike that.

Louisiana law provided, did it not, that after January 1st, 1993, precinct consolidations, putting them together, could be made, reducing the number of precincts in the parish parish-wide, and quote, substantially, unquote, reducing election costs, is that a fair statement?

A. That is true. As a matter of fact, I am currently engaged in a project with the Police Jury to consolidate precincts.

Q. But they haven't finished consolidating precincts yet, have they?

A. No, they have not.

Q. And it has been what, four years since the Police Jury originally passed this plan?

A. There was a moratorium on precinct—on changing any precinct lines in the State of Louisiana for approximately two years. January 1st, 1994, they can change them, and it will go on until just before the next Census.

[166]

Q. Didn't you just testify that after January 1st, 1993, precinct consolidations could be made?

A. It could be 1993. There was a moratorium for about two years.

Q. So it has been two years, and the Police Jury still hasn't bothered to consolidate these precincts, is that right?

A. It is totally up to the Police Jury.

Q. If election costs were really a big concern on this precinct issue, it would be in the Police Jury's and the School Board's interest to reconsolidate precincts as fast as possible, right?

A. Part of the problem—yes. Part of the problem is this procedure.

Q. You answered my question, yes. Do you need to explain your answer, or is it yes?

A. I would like to. I would say yes, and I would also like to explain.

Q. So in order to answer the question whether or not it would be in the Police Jury's and School Board's interests to reconsolidate as soon as possible, yes is not sufficient, you would need to explain that?

A. I would like to.

Q. Please.

A. Certainly it is in their best interest, because it [167] reduces the cost of elections. The average costs of elections per precinct in the State of Louisiana is between $850 and $900. According to the Commissioner of Elections Office.

If the Police Jury in Bossier Parish goes ahead and consolidates precincts as they are now, and this case is still pending, then it would be a wash. It would be a useless waste of public money.

Q. Well, since you raised this figure of how much election costs are per precinct, let me ask you a question

about that. School Board elections in Bossier Parish are usually held in the fall of even numbered years, correct?

A. Okay. I will go along with that.

Q. And that is when congressional elections are held, correct?

A. Yes.

Q. You testified that election costs are about $800 per precinct for elections, is that correct?

A. That is what the State of Louisiana told me.

Q. But you did not communicate—strike that.

Isn't it true that that figure includes the costs that are borne by the State of Louisiana?

A. Yes. If the State of Louisiana participates in the election. Now it is possible that the School Board elections may be held at a different time.

[168]

Q. If the School Board elections—the School Board elections would normally be held at the same time as congressional elections, we just agreed to that, is that correct?

A. Yes.

Q. Now, isn't it true that under Louisiana law that at least half of the cost of such elections are borne by the State of Louisiana?

A. It depends entirely on the number of races being held. There is a formula, and I am not aware of the formula. I cannot recite the formula, but yes, you are right, they do get state assistance. There is currently a bill on the Louisiana state legislature that may prohibit a certain amount of that if it passes.

MR. MULROY: Judge, at this time I would like to ask the court to take judicial notice of certain Louisiana statutes regarding election expenses, and just what the formula is that Mr. Joiner is referring to. For the purposes of notifying counsel, opposing counsel, I am refer to Title 18, Sections 14.1(a)—1400.1(a), 1400.2(a), and 1400.3(a), and without belaboring the point further, I would simply like to ask permission to approach to give this statute to the Clerk.

THE COURT: Without objection you may do so.

MR. MULROY: Thank you, Judge.

[169]

MR. THORNTON: Do you have a copy for me? I didn't bring my entire statute.

THE COURT: You can get it up in the library.

MR. THORNTON: Louisiana statutes?

THE COURT: Sure.

MR. MULROY: I would be happy to do that, Mr. Thornton.

THE COURT: We have every state code in the country here.

BY MR. MULROY:

Q. You said before that you could have a single, just a single black majority district inside Bossier City by creating only fourteen new precincts, right?

A. Yes.

Q. And it would also be the case that in such a case the precincts would be all within Bossier City, primarily along the river, isn't that what you testified to?

A. I believe that that is correct.

Q. Isn't it also true that one polling place can be used for two different precincts in Louisiana?

A. Yes.

Q. And that in such a case Louisiana law allows the parish to reduce the number of polling place officials to as low as two commissioners per precinct?

A. It is up entirely to the Commissioner of Elections [170] Office.

Q. Isn't it actually up to the parish—

THE COURT: He is probably a friend of Governor Edwards.

THE WITNESS: Soon not to be Governor Edwards.

BY MR. MULROY:

Q. Isn't it actually up to the Parish Election Board?

A. They can—the Registrar of Voters and the Clerk of Court maintain most of that information. I am not either one of those, so I would rather not testify to that.

MR. MULROY: Judge, at this time I would like to ask the court to take judicial notice of some other Louisiana statutes that describe this issue and establish that in such a case—first of all, you can consolidate polling places across precincts, and that in such a case you can reduce the number of polling place officials to as low as two commissioners per precinct.

THE COURT: Very well.

MR. MULROY: The statute—

THE COURT: Without objection it will be received.

MR. MULROY: Thank you.

THE COURT: Next?

BY MR. MULROY:

Q. These measures that I am talking about would reduce election costs, would they not?

[171]

A. If they were implemented, yes. However, just because you combine two polling places in one precinct does not mean, arbitrarily, that you reduce total costs, because you are probably going to have a machine for each precinct. So you would have machine costs, too.

Q. Did the School Board direct you, prior to October 1st, 1992, to do a comprehensive study of these issues to see just how much election costs could be reduced?

A. No. Because it varies, and no, they did not.

Q. Now, isn't it further true that you can implement precinct splits by using additional voting machines, or by using lockouts on voting machines?

A. You can use lockouts, but it depends on the quality and age of the machine.

Q. Now as to the use of these additional voting machines or lockouts, these are measures which need only be taken when there is a School Board election under this scenario, correct?

A. In its simplest terms, yes.

Q. And assuming that School Board elections are held once every four years, there are going to be at most two more elections between now and the next redistricting, isn't that fairly stated?

A. Yes.

* * * *

Excerpts from Volume II of Trial Transcript in *Bossier Parish School Board* v. *Reno*, C.A. No. 94-1495 (D.D.C.), April 11, 1995

Testimony of Plaintiff's witness William T. Lewis—Cross Examination by the Defendants

* * * *

[8]

* * * *

Q. How many regular high schools are there in Bossier Parish?

A. Six.

Q. And one of them, Plain Dealing Senior High School is seventy-nine percent black according to that report?

A. Close.

Q. So by drawing six attendance areas and maintaining those in the school district, you come up with a school that is seventy-nine percent black?

A. Correct.

Q. And that high school is up here in Plain Dealing in Mr. Myrick's district?

A. Correct.

Q. How many regular elementary schools are there in Bossier Parish?

A. There are sixteen.

Q. And there are also attendance areas for elementary schools?

A. That is right.

Q. And four of those schools are predominantly black aren't they, Mr. Lewis?

A. Correct.

[9]

Q. And those are Bossier and Butler Elementary?

A. Right.

Q. And those are down in the City of Bossier?

A. Correct.

Q. Which is down in this area which is marked with the district seven and eight area on U. S. exhibit 76 D?

A. Correct.

Q. And Plain Dealing Elementary also is predominantly black?

A. Correct.

Q. And that is back up here in Plain Dealing in Mr. Myrick's district?

A. Right.

Q. And Plantation Park Elementary is also predominantly black, is it not?

A. I am not going to say offhand that it is, but it is close.

Q. All right. So by drawing sixteen attendance areas and maintaining those for elementary schools, you come up with three or four that are predominantly black?

A. Yes.

Q. And the reason for that is it not, Mr. Lewis, that when you—when you divide these areas, it is the com-

position of the neighborhood or community that dictates the racial composition of the school in your view?

[10]

A. We believe in the neighborhood school system.

Q. All right. Now the assignment of faculty and staff to schools is in your control, is it not, or that of the school district?

A. That is correct.

Q. It doesn't depend on where they live, or their neighborhoods?

A. No.

Q. And after that report that you signed and made to the court, your full-time teaching staff, including principals and assistant principals, was just under ten percent African American?

A. That is correct.

Q. And by the way, can I call these teachers as a form of short reference, which I believe is the practice that you follow in that report?

A. Correct.

Q. Let's talk for a moment about the assignment of teachers to those majority black schools that we identified a few minutes ago. Plain Dealing Middle and Senior High School at that time had sixteen white teachers and twelve black teachers, which made the teaching staff there over forty percent black?

A. Right.

Q. And that is more than four times the district-wide [11] average?

A. Correct.

Q. And Bossier Elementary had six white and five black teachers, which made that composition about sixteen percent black?

A. Close.

Q. And Butler Elementary had four white teachers and ten black teachers, which made that composition over seventy percent black?

A. Correct.

Q. And that is seven times the district average?

A. I agree with you. I mean I am not disagreeing with what you are saying. That is probably true.

Q. Well, you are welcome to reference the report if you have any doubt about my numbers, Mr. Lewis. You believe—this is not an accident is it, Mr. Lewis?

A. No.

Q. These are deliberate—these proportions are deliberately assigned by the Bossier Parish school district?

A. Between the school and the principal—between the district and the principals, yes.

Q. And isn't it true, Mr. Lewis, that at your deposition that one of the reasons that you gave for putting black teachers together in concentrations in schools over their representation generally on your staff is that—

[12]

MS. BRANNAN: And I quote, Mr. Thornton, from page seventy-eight of the deposition.

BY MS. BRANNAN:

Q. —that black teachers sometimes feel uncomfortable when there are not many other black teachers at a

school with them, and they feel more comfortable when there are others, isn't that correct?

A. That is not the primary reason. That is a reason, but that is not the primary reason.

Q. And you believe that the primary reason that you think that the black community wants role models in the form of black teachers—

A. That is correct.

Q. —in their schools?

A. They have expressed that to us many times.

Q. And so you deliberately respond to that request of the black community by disproportionately assigning black teachers to black schools?

A. That is correct.

Q. Mr. Lewis, isn't it true that an early order of the court in the *Lemon* case required the Bossier District to maintain a Biracial Committee?

A. Yes.

Q. And it was to be comprised of black and white community members?

[13]

A. Yes.

Q. And to recommend to the School Board ways to achieve and maintain unitary status and improve education?

A. I don't know that that was the original intent, but I am assuming that it was, to make sure that we did maintain the proper rules and regulations.

Q. That committee stopped meeting in 1976, didn't it?

A. Correct.

* * * *

[15]

* * * *

Q. Isn't it true, Mr. Lewis, that in this document that you [16] submitted to the court in the spring of 1994, under section 9-A there you reported, and I quote, the Bossier Parish School Board does have a Parish Biracial Committee available?

A. That is correct.

Q. And that wasn't true, was it?

A. Well, it just wasn't active. It doesn't mean that it was disbanded. It just wasn't active.

Q. Well, it hadn't met since 1976 except for the few short meetings that we just discussed in early 1993, isn't that true?

A. That is correct.

* * * *

Testimony of Plaintiff's witness William T. Lewis—Redirect Examination by the Plaintiff

* * * *

[21]

* * * *

Q. The court asked you, Mr. Lewis, about attendance zones. When you draw —

THE COURT: Now you are interjecting a new term of art.

MR. THORNTON: Attendance lines.

THE COURT: Whatever.

BY MR. THORNTON:

[22]

Q. When you draw attendance lines, do you also give those to the federal courts?

A. Yes, sir.

Q. All right, sir. That is a part of the obligation, and that is done?

A. Yes, sir.

Q. Have you had anybody complained about those lines?

A. No, sir.

Q. As a matter of fact, in the *Lemon* suit that you were asked about, Mr. Lewis, have you been sued, or had motions or petitions filed against the Bossier Parish School Board over the last ten, twelve or fifteen years?

A. No, sir.

Q. Now, you were asked about the black teachers, and you said that somebody had suggested that black

teachers ought to be assigned to black schools to serve as role models for the young students, is that correct?

A. That is correct.

Q. Who has asked you to do that?

A. Mr. Price and other groups of the black community. They felt like, and I feel the same way, that black kids need good black role models. And the people in Plain Dealing, for example, would go crazy if we took all of their black teachers out of that school and spread them out throughout the parish, because the school is majority black.

[23]

Q. So you were doing this because someone in the black community was saying that that is what the black community would like for you to do?

A. Yes, sir.

Q. All right. Now the court asked you a question about some of the schools that are very predominantly black. It didn't ask you the question that I would like to ask you. Is it not a fact that there are some private schools that opened up in some of those areas?

A. Yes, sir.

Q. And that the private schools are predominantly if not all white?

A. Yes, sir.

Q. Is there anything under the law that you can do about that?

A. No, sir.

Q. Now, you have tried to recruit black teachers, have you not?

A. Yes, sir.

Q. Would you tell the court, if it is true, that you have tried harder to recruit black teachers than white teachers?

A. That is correct, we have.

THE COURT: Why?

THE WITNESS: Why? Because we need black teachers in our school system. We need good black role models for our [24] black kids. They need someone to look up to.

I was personnel director for Bossier Parish for six years, from 1980 to 1984. When I would go to the colleges and universities throughout Louisiana, Texas, Mississippi and Arkansas, you would find 120 to 130 teachers graduating every year. A large number of those people being black. Today you go to them, you don't find many people in education any more. They are just not going into it.

The black—the young black people have greater opportunities in other places rather than teaching now, and our salary scale in Bossier Parish—we are actually a bedroom community for Shreveport. Most of the people work in Shreveport, and a lot of them live over there, but they have a tax basis quite a bit greater than ours. Therefore, they pay anywhere from three to $5,000 a year more than what we can.

We can't hang on to our good black teachers in our parish, because they will go over to where they can make the most money. You can't blame a kid coming out of college for wanting to go where the money is. Their start—the difference between our pay and what they make is more than what I made when I started for a year.

So there is quite a bit of difference in today's society. Money is the key to a young person as far as their goals are concerned. And so they are going to go to a school [25] system where they can make more money than they will teaching in Bossier Parish. Although we have got the best school system in the state, they are still going to go where the money is.

THE COURT: What was your pay?

THE WITNESS: When I started teaching?

THE COURT: No, as superintendent?

THE WITNESS: As superintendent, 65,000, and the man across the river makes over 100,000. So there is quite a bit of difference there. Of course they have got more students than we do. They have got about 55,000, we have got about twenty-two. So there is a difference. I wouldn't swap with him for anything. We have got a better school system than anybody else.

THE COURT: What are your SAT scores?

THE WITNESS: We don't give the SAT. We give the ACT scores, and it ranks nationally with the national results, close to the national results.

BY MR. THORNTON:

Q. Have you ever asked any of the members of the black community in Bossier Parish to help recruit black teachers?

A. Yes, sir, we have.

Q. Who? Who have you asked?

A. We have asked Mr. Price and other people. Mr. and Mrs. Harry have gone before. Mr. and Mrs. Martin. People in the [26] community.

People that used to work for the school system. One of the things, and I kind of resent this, because I have never had a lot of difficulty relating to people when I was in personnel, but they said that a white person could not recruit a black teacher to a school system.

Well, in order to try to help in that light, we have black administrators, or supervisors, or principals, or whatever, and community members, to go along with us to help recruit, and we still do not get the numbers that we would like.

Now, we get four or five black teachers every year, but we have four or five leaving every year to go next door to teach. As a matter of fact, after school started this year, the school system next to us took four of our black teachers from one of our black schools.

I can't do anything about that. It is their choice to leave. And for us to try to get someone to come in then and take their place, they are not there. So it gives us a very difficult problem. I mean it is a terrible situation for us to be in knowing what we want to do and not being able to do it. And we want good role models for our black kids.

* * * *

Testimony of Government's witness Jerome Darby—Cross Examination by the Plaintiff

* * * *

[38]

* * * *

Q. I have just a few questions to ask, if you please. You are a member of the Police Jury of Bossier Parish, are you not?

A. Yes, sir.

Q. You first ran for that office in what year?

A. 1983.

Q. And was that in a district under the old plan that was in existence from the 1980 to the 1990 census?

[39]

A. Yes, sir.

Q. All right, sir. And when you first ran in 1983, did you run from a district that had a majority white population?

A. Yes, sir.

Q. Do you remember the composition, racially, of that district?

A. The composition was about thirty, thirty-seven percent black

Q. All right. A little—all right, thirty-seven percent. And in 1983 when you ran for that post, how many opponents did you have, and what were their racial designations?

A. Excuse me?

Q. Who did you run against?

A. The incumbent who was black, and also a white opponent.

Q. The black opponent was Johnny Gipson, was it not?

A. Yes, sir.

Q. That is G-i-p-s-o-n, isn't it?

A. Yes, sir.

Q. And he had been elected before you to the Police Jury?

A. Yes, sir.

Q. So in that district you took on the incumbent and another white—and a white candidate?

A. Yes, sir.

Q. All right, sir. Did you win that race?

A. Yes, sir.

[40]

Q. Now, was race an issue in that political campaign?

A. Was it an issue?

Q. Yes. Did you make it an issue?

A. No, sir.

Q. Do you know of anybody else who made it an issue?

A. Yes, sir.

Q. Who?

A. My white opponent.

Q. All right, sir. But you won anyway?

A. Yes, sir.

Q. All right. Now you ran again in 1987, did you not?

A. Yes, sir.

Q. Who were your—the same district? From the same district?

A. Yes, sir.

Q. Was the composition—the racial composition roughly the same again, about thirty-seven percent black?

A. Yes, it was.

Q. And against who did you run?

A. The same two opponents.

Q. Mr. Gipson?

A. And Mr. McDaniels.

Q. And McDaniels, all right. And who won that race?

A. I did.

Q. Okay, sir. Now the Police Jury then reapportioned, and [41] you ran under their present plan, which is also the same redistricting proposal of the School Board, is that correct?

A. Yes, sir, that is correct.

Q. You ran in 1991?

A. Yes, sir.

Q. All right, sir. Who were your opponents?

A. I was unopposed.

Q. You filed and no one ran against you?

A. Yes, sir.

Q. So you swept into office without opposition?

A. Yes, sir.

Q. Now then, sir, do you—how many seats do you believe that African Americans or blacks ought to have on the Police Jury or on the School Board?

A. At least two to three.

Q. Why, sir?

A. One is because of the fact that by me being—serving the Police Jury for three terms, I have never been able to get white support, regardless. No matter how qualified I am, my white colleagues never support me, under no circumstances. I felt that if we had at least two to three minorities on the Police Jury that it would definitely be a lot different.

Q. Do you believe that you are entitled to two or three because of the proportion of African Americans to the entire population?

[42]

A. Yes, sir.

Q. All right. Has somebody told you that the Voting Rights Act provides that you should be elected to office as a race in proportion to your numbers to the population?

A. Yes, sir.

* * * *

[44]

* * * *

Q. Mr. Darby, I am showing you an exhibit. It is number 5, I think. It is on the blue there, Mr. Darby. What exhibit do I call it? Exhibit number—exhibit number 5. Now, that exhibit purports to be the minutes, an extract of the minutes of a Police Jury meeting in January of 1994. Would you read it, sir, or have you read it?

A. The top?

[45]

Q. Just read it to yourself right quickly. Did you attend that Police Jury meeting?

A. Yes, sir.

Q. The Police Jury meeting was, in part, a meeting about whether it wanted to redraw its plan, and there is some controversy about what it is saying, but do you recall that meeting?

A. Yes, sir.

Q. All right. And in that meeting, the Police Jury of Bossier Parish decided what?

A. That it stood by its original reapportionment plan.

Q. Okay. And it even quotes you as stating that you are concerned that if the Police Board and Police—the School Board and the Police Jury have different district lines, it would be confusing to the citizens of Bossier Parish?

A. Yes, sir.

Q. Did you make that statement?

A. Yes, sir.

Q. All right. However, Mr. Darby indicates that he supports the Police Jury's original plan, is that correct, sir?

A. Yes, sir.

Q. Did you say that?

A. Yes, sir, I did.

Q. So the minutes are accurate?

[46]

A. That is accurate.

Q. And that was as late as January 11th, 1994, was it not?

A. Yes, sir.

Q. Do you still stand by those statements?

A. That I support the Police Jury plan as of now?

Q. Yes?

A. No, sir. May I explain?

Q. By all means, sir.

A. Okay.

Q. The Judge would probably like it.

A. In January 11th of 1994, at that time I wasn't aware of the information as far as you could draw minority districts. And what I was saying, and what I have always said, that I wanted to see both, since both bodies have twelve members representing the same people, that we have the same district lines.

And that is what I was saying in that meeting. At the time—at that time I hadn't seen where you could do minority districts. So what I was saying is the fact that you could—that I supported what we had in place because of the fact that I was concerned about what it would do as far as jeopardizing that one seat that we did have.

Q. And you didn't know in January of 1994 that the NAACP plan had been drawn to provide two minority —protected minority districts? You didn't know about any such plan?

[47]

A. I didn't keep up with it, sir.

Q. All right, sir. Now, you have contended that blacks are discriminated against in the school system in your narrative statement?

A. Yes, sir.

Q. That is a pretty broad statement, sir. Do you have any instances or any names to supply the court?

A. I have several instances if you would like me to share some of them.

Q. Well, if the court wants it in a moment. Let me ask you this. Did you report those to the school system?

A. Yes. Not to the administration. Usually it was always directly to that school.

Q. All right. Whom did you report these to?

A. Most of the time it would be like the school principal.

* * * *

[48]

* * * *

Q. If I told you that any child, black, white, any child, that was accused of an infraction that might result in expulsion or suspension, that any such child had the right to a hearing in which he or she could bring anyone they wanted there in his or her behalf? Do you know that to be true?

A. Yes, sir.

Q. All right. Do you know who generally presided over those hearings?

A. Who generally presided over those hearings?

Q. Um-hum?

A. Probably it would be the school attendance officer.

Q. Well, do you know a Mrs. Betty McCauley?

A. Yes.

Q. Did you know that she presided over those for some [49] years?

A. She hasn't always presided over them.

Q. No, she hasn't.

A. At the time that you asked me about the principal?

Q. Yes?

A. That was Mrs. Owens.

Q. Oh, okay.

A. And at the time it was Ms. McCauley, she was also the coordinator at the very school we are talking about.

Q. All right. Ms. McCauley is black, is she not?

A. She is.

Q. And at some point along the way a man named Joshua Bryant —

THE COURT: How do you spell that?

MR. THORNTON: B-r-y-a-n-t, J-o-s-h-u-a, I think.

THE COURT: All right.

BY MR. THORNTON:

Q. Mr. Bryant?

A. Yes, sir.

Q. And he presided over many of these hearings, did he not?

A. I couldn't answer that, Mr. Thornton, because I haven't gone to that degree. The degree that I have been involved with has been strictly for me, as a Police Jury, to represent parents in my district. It wasn't to that level. It was always directly with the school.

[50]

Q. Did you know Mr. Bryant?

A. Yes, I do.

Q. What race is he?

A. He is black.

Q. All right. Now then if I told you that neither Ms. McCauley nor Mr. Bryant, in looking over these—in presiding over these hearings, could expel or suspend, that only the superintendent could, did you know that to be true?

A. No, sir, I didn't.

Q. And as the superintendent has testified in his narrative statement, when he makes a decision to accept or reject the recommendation for expulsion or suspension, that he doesn't even know the race of the student, are you prepared to deny that?

A. No, sir. If you tell me that that is true, I will accept that, sir.

Q. All right. Now, having learned all of this, can you think, or would you like to tell the court or us, for that matter, how you believe that we could make the suspension or the discipline system any fairer? What should we do that we are not doing?

A. What should you do that you are not doing?

Q. Yes, sir?

A. One of the things, I think, is the fact that even though you have those people in place, they haven't always been in [51] place. Ms. McCauley was one time the principal of a school. When I have gone for parents it has always been to resolve it before it did get to that, and so the level that I have always dealt with principals on was the level of the kids having problems in the classroom, as well as whether the teacher didn't quite understand what was going on with that child. It has always been on that level. It has never been to the level that you have described at this moment.

Q. Okay. Would you fault our hearing system as being unfair?

A. Being unfair?

Q. Yes? Would you say that it is unfair?

A. Just because you have two black people that are involved?

Q. No, sir. Just because we have full and open hearings, and just because we don't make race an issue?

A. Yes, sir.

Q. Is that fair enough?

A. I guess it is.

Q. Then can you think of any reason why more—proportionately more black children are disciplined than white?

A. Can I think of any reason?

Q. Yes? If the hearing system is fair, what would be the reason?

[52]

A. Well, there are so many other variables that you have to take into consideration. Each case is different.

There is information that sometimes might not always get—they might not get all of the information correctly.

A lot of things goes on that—before it even get to that. So before I make a statement like that, I would have to be able to look at all of the facts, and look at how it takes place, and all of the proper information to get to that hearing.

* * * *

Q. Now, you state that you have tried to forget about race and politics, and that you concentrate on issues?

A. Yes, sir.

Q. You even state that you consider yourself to represent all of the constituents of your district, regardless of race, correct?

A. Yes, sir.

Q. And you have made that a theme in your campaigns, have you not?

A. Yes, sir.

Q. Do you think that that is proper to put race behind and talk about issues and represent the entirety of a [53] constituency?

A. Do I feel that that is proper?

Q. Yes?

A. Yes, sir.

Q. Could it be, sir, in your opinion that that may be the reason why you got so many white votes which enabled you to win in that district?

A. To win in my district?

Q. Exactly? Could that be the reason, because you didn't make race an issue?

A. Well, for me as a black person, race has always been an issue, all thirty-seven of my years, regardless. I don't make the issue, but it is an issue, something that I live with.

Q. But you got a lot of white votes, didn't you?

A. Well, when I go back and look at the statistics, it was based on that black base, which is the black community is the one that really helped me to be successful. I did get some white votes, but I wouldn't say a lot of white votes.

Q. Well, Mr. Gipson ran. Didn't he get some black votes?

A. He sure did.

Q. Okay. But in the overall, in the end, you got a lot of white votes which took you over fifty percent, didn't you?

A. Yes, sir.

Q. And you won?

[54]

A. Yes, sir.

Q. And you didn't make race an issue, did you?

A. No, sir.

Q. And I am asking you now sir, maybe when you didn't make race an issue, maybe that is the reason that you got some of those white votes, hum?

A. Yes, sir, but I have never made it an issue.

Q. All right, sir. And I congratulate you.

THE COURT: How many African Americans, sir, reside and are eligible to vote in your district?

THE WITNESS: At the time in 1983, it was about 500.

THE COURT: Wait a minute. 19?

THE WITNESS: 83.

THE COURT: 83?

THE WITNESS: Yes, sir.

THE COURT: Out of 500 voters?

THE WITNESS: Registered black voters.

THE COURT: And how many white?

THE WITNESS: I can't say, Judge, but it was more than 500. It has been a pretty good while, but it was a large number.

THE COURT: When was the last time that you were elected?

THE WITNESS: In 1987. Well, the last time I was [55] elected, 1990.

THE COURT: And what was the percentage of blacks and whites at that time, registered voters?

THE WITNESS: At that time I believe it was twenty-six percent.

THE COURT: That doesn't answer my question. How many black voters were there then, 1990, and how many white voters, sir?

THE WITNESS: I don't recall. I can't tell you.

THE COURT: Well, which was the majority?

THE WITNESS: White was.

THE COURT: How much of a majority?

THE WITNESS: About sixty percent.

THE COURT: Sixty/forty?

THE WITNESS: Yes, sir.

THE COURT: And what was your margin of victory?

THE WITNESS: For my last election?

THE COURT: In 1991?

THE WITNESS: Well, that was the election that I was unopposed, so I didn't have anyone running.

THE COURT: What was your margin of victory, even though you were unopposed?

THE WITNESS: A hundred percent, I guess.

THE COURT: All right.

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Testimony of Government's witness Jerome Darby—Redirect Examination by the Government

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[56]

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Q. Mr. Darby, there is a military base in your district, is that correct?—

A. Yes, sir.

Q. Does that have any effect on your ability to be elected in a white majority district?

A. Yes, sir. In fact it has a big difference. That is what makes, I think, my election a lot more different than the whole area as far as Bossier Parish, because we do have a large military area in the Barksdale Air Force Base which they count that in my district, which makes it look like I have a large number.

But mostly military voters, they don't vote, because they live not necessarily—they are not registered to vote there, and they live up—not live other place, but basically as far as where they are registered it is not there. I have received some military votes as well.

Q. Well, of those military voters in your district who do vote in the local election, is there any reason to think that they might be more or less likely to support you as a black candidate?

[57]

A. One of the things from my own experience is that they are more open minded than most people that do live in Bossier. I think that a lot of it has to do with the exposure and being more open minded.

Q. When you refer to exposure, do you mean the environment in which military people live in, on base or in off base housing, as opposed to the rest of the parish?

A. Well, that and also coming from different backgrounds of the country where people are a lot more open minded.

Q. So most of this military population is not from Bossier Parish?

A. No.

Q. They would not be from Bossier Parish?

A. No. Basically, they are from all over the whole country.

Q. In terms of whether or not they live in an integrated environment compared to the other white residents of Bossier Parish, do you have any knowledge about that?

A. Yes. In fact basically they work real closely with different people from different ethnic backgrounds. Also you have a lot of blended families in military, so it is something that is not real unusual for them.

Q. And when you say blended families, what do you mean by that?

A. Meaning families that are not necessarily both white and [58] white or black and black.

Q. Do you think that you could—based on your experience in Bossier Parish politics, do you think that you could get elected in a white majority district against a white opponent in some other part of Bossier Parish where there wasn't military population?

A. No, by no means. And that holds true because of the fact that even when I have gone and campaigned for

other people, usually people in that parish vote along racial lines, meaning that blacks vote for blacks, and whites vote for whites.

Q. Let me turn to another topic. Mr. Joiner showed you—

THE COURT: Where was Congressman—former Congressman Espe from? Bossier Parish?

THE WITNESS: Espe, from Mississippi.

THE COURT: Oh, that is right, another state. Mr. Thornton condemn me for confusing Louisiana with Mississippi.

THE WITNESS: Yes, sir.

BY MR. MULROY:

Q. Let me move to another topic. Mr. Thornton showed you some minutes of a January 11th, 1994 meeting. Let me ask you a question or two about that. At the time of that meeting, did you understand that there was an NAACP plan which—consistent with the one person one vote requirements and contiguity requirements created two black majority [59] districts? Did you understand that at the time of the January 11th, 1994 meeting?

A. No, sir.

Q. There is also a statement in those minutes that Mr. Thornton asked you about that said that you favored having the Police Jury plan and the School Board plan be the same to avoid voter confusion. The Police Jury plan and the School Board plan for the 1980s were different, correct?

A. Yes, sir.

Q. So for the past ten years or more they have been different, correct?

A. Correct.

Q. In fact, since the proposed plan has not yet been implemented because it is the subject to this preclearance suit, the current plan to this day still has different plans for the School Board and the Police Jury, is that correct?

A. Yes.

Q. If you had to choose, Mr. Darby, between having a situation where the Police Jury plan and the School Board plan were the same, and there were no black districts whatsoever, or another situation where you had a Police Jury plan and a School Board plan be different, but at least the School Board plan would give you two black districts, if you had to choose between those two, which one would you choose, Mr. Darby?

[60]

A. The School Board plan that would give you black districts.

Q. Mr. Thornton—

THE COURT: In order to arrive at that answer, Mr. Darby—

THE WITNESS: Sir?

THE COURT: Excuse me, I apologize to you. In order to give that answer or arrive at that answer, how would you square that with the alleged impediment of Louisiana state law? Do you know what I mean by that?

THE WITNESS: No, sir, if you could explain.

THE COURT: Well, counsel have informed me that in any redistricting plan Louisiana law does not permit changing precinct lines. Have you heard that?

THE WITNESS: I have heard them talk about that

throughout this trial. Basically, when we was redoing our—when we was doing our reapportionment, that wasn't a factor. Basically what we basically concentrated on was just the districts, drawing the district lines.

THE COURT: And that cut across precinct lines?

THE WITNESS: District lines?

THE COURT: The new district lines that you were drawing cut across precinct lines?

THE WITNESS: Yes, sir.

THE COURT: And they have argued here that [61] Louisiana state law prohibits that.

THE WITNESS: Yes, sir.

THE COURT: Okay. All right.

MR. MULROY: Thank you, Judge. One final point.

BY MR. MULROY:

Q. Mr. Thornton was asking you some questions about discipline in the schools in Bossier Parish and whether there was any racial discrimination in meting out discipline to students. Your experience you testified on cross examination with the discipline of students was at the lower level, believe you got to the formal hearing process, is that correct?

A. Yes, sir.

Q. And it is possible for discipline to occur at that level, correct?

A. It definitely is.

Q. And in your experience that discipline at that lower level which you know about occurred disproportionately to black students?

A. Yes, it did.

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Testimony of Government's witness Jerome Darby—Recross Examination by the Plaintiff

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[62]

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Q. So it wasn't a question of cutting and splitting precincts, it was creating new precinct lines in order to reflect the shift of population from the 1980s to the 1990s?

MR. MULROY: Your Honor, I would like to object to the way that counsel is characterizing that statement, as though there was necessarily some difference between creating a precinct and cutting and splitting precincts.

THE COURT: I think that the court has got enough intelligence to understand that. Overruled.

MR. MULROY: Thank you, Judge.

BY MR. THORNTON:

Q. You created new precincts under the one man one vote [63] rule, didn't you?

A. Yes, sir.

Q. And that is your obligation as a Police Jury, is it not?

A. Yes, sir.

Q. Because you are the governing body of the parish?

A. Yes, sir, that is correct.

Q. So you create new precinct lines to reflect the shift in population, and then from that you drew your district lines, twelve of them, is that correct?

A. Yes, sir.

Q. All right. Mr. Darby, do you have any reason to believe, or do you have any statistics, or is there any data available to indicate to you that the white votes that you got in your district were Barksdale people—

THE COURT: Were what?

BY MR. THORNTON:

Q. Were Barksdale Air Force people any more than they were just any other white citizens in that district?

A. Do I have any data?

Q. Yes?

A. Well, if you look at the two precincts that are in my district, basically one of the precincts is predominantly black. It has some white voters there as well. The other precinct is predominantly white. Of course, that means that when military people vote, they vote at that predominantly [64] white precinct. So based on what you just said, no.

Q. So you don't have any data on that?

A. No.

Q. Actually, Barksdale Air Force Base has been there in Bossier Parish for seventy, eighty, or ninety years, has it not?

A. Yes, sir.

Q. It is an old Air Force Base?

A. Yes, sir.

Q. And Bossier Parish is pretty well populated by people from the military who retired at Barksdale Air Force Base and simply stayed in the Bossier community, isn't that correct?

A. Yes, sir, that is correct.

Q. So Barksdale people, whites and blacks, are scattered throughout the parish, are they not?

A. Yes, sir, that is correct.

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Testimony of Government's witness Jerome Darby—Further Redirect Examination by the Government

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[64]

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Q. Mr. Thornton just asked you about whether the Barksdale [65] population might be scattered throughout the parish. Based on your experience as a native of Bossier Parish, and your experience in Bossier Parish politics, would you say that there is a higher concentration of what Mr. Thornton called, Barksdale people, in your district as opposed to the rest of the parish?

A. Yes. Because it is closer to the military base, and usually for the area, as far as the commuity, Government Park, and the area along there, that is where most military people, if they are not living on base, they move in those areas.

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Testimony of Defendant-Intervenors' witness Jerry Hawkins—Cross Examination by the Plaintiff

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[67]

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Q. Mr. Hawkins, how many seats do you believe on the School Board African Americans ought to have?

A. At least two, sir.

Q. Why? Why two?

A. Because of the districts.

THE COURT: Because of what?

THE WITNESS: Because of the number of districts that we have.

BY MR. THORNTON:

Q. Do you think that you ought to have two members because that is your proportion to the population?

A. Yes.

Q. All right. Do you believe that that is what the Voting Rights Act stands for?

A. Yes.

Q. Has anyone ever told you any differently?

A. No.

* * * *

[68]

* * * *

Q. You made the statements that blacks are treated unequally in the school system. Do you believe that?

A. Yes.

[69]

Q. All right. Are you familiar that—with the law suit entitled *Lemon versus Bossier Parish?*

A. Yes, partially.

Q. Do you understand it to be the litigation vehicle that presides over the Bossier Parish school system with regard to integration?

A. Yes.

Q. All right, sir. If you believe that blacks are treated unequally in the school system, have you ever filed, or seen filed, or caused to be filed any documents in the *Lemon* case in say the last fifteen years that would assert that?

A. No, sir. But in 1988, I believe it was 1988, the Concerned Citizens raising money for that, and we hired an attorney out of Monroe to go against that litigation, I believe.

And the lawyer did not file the suit. And we was out of money, so we couldn't file another suit, so we went another different direction by contacting J. Bennett Johnson. Sent him a letter, and also sent a letter to Congressman Buddy Roemer at that time. We done everything we could to try to stop this litigation.

Q. I see. But you did not file—nothing was filed in *Lemon*?

A. No, no, sir.

Q. That would have been the place to file it, wouldn't it?

[70]

A. I suppose.

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Testimony of Defendant-Intervenors' witness George Price—Cross Examination by the Plaintiff

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[77]

* * * *

Q. Tell me, sir, how many seats on the School Board should black citizens hold?

[78]

A. I believe that the population of Bossier Parish is such that it is sufficient enough to elect at least two blacks to the Bossier Parish School Board.

Q. Do you believe that this is true because of the proportion of the black population to the entire population?

A. When we look at the number of the seats on the Bossier Parish School Board, taking into consideration the total population of the parish, I feel that to be the case.

Q. All right. Now, I want to show you something, Mr. Price, and ask you some questions about it. Do you have your narrative statement in front of you?

A. I do.

MR. THORNTON: I am not sure that I have his latest one right here. May I approach the witness and coordinate?

THE COURT: Of course.

THE WITNESS: What page was that?

MR. THORNTON: Well, let's see, it was on page twelve, and it appears to be twenty-three, paragraph twenty-three.

THE WITNESS: That is not it. Do you have a current—is that my testimony that you have?

MR. THORNTON: Yes.

THE WITNESS: It is April 7th. You need to get the updated copy.

MR. THORNTON: While he is trying to get that I [79] will go on and save some time.

BY MR. THORNTON:

Q. Mr. Price, when you asked to have some participation, or wanted some participation in drawing the redistricting or reapportionment plan for the School Board, you wrote some letters, did you not?

A. That is correct.

Q. And I think that those letters are exhibits here?

A. Right.

Q. All right, sir. And I think that you have a complaint that they were not answered, or that you were not allowed in on the reapportionment planning, is that correct?

A. No, sir. That is partially correct. Initially, I wrote a letter to the superintendent in March of 1992 requesting information concerning the upcoming reapportionment process, and that we would want to be made aware of the status of the reapportionment process.

As I communicated with the Bossier Parish School Board, I always did that in a written form, and I always asked that they would respond in a written form, because in the past I had been made aware of people not remembering communications by telephone or by hearsay. So I have always communicated in a written form, and I have always asked them to respond in a written form. That was not done.

Q. What kind of participation did you have in mind?

[80]

A. I wanted to be involved to present what I considered the minority views on the current makeup of the School Board which consisted of twelve white members, and the fact that we felt as though we needed a voice on that particular School Board.

Q. All right. Did you want to have a vote in the reapportionment?

A. No, sir. As I indicated in my correspondence to the School Board, we always respected the authority of the School Board, and we always asked that we work through the School Board.

Q. Did you want to have a right to sit in the executive sessions with them when they talked about this problem?

A. No, sir. All of my communications was through School Board members. I never considered myself capable or able or authorized to sit in any kind of executive sessions with the Bossier Parish School Board.

Q. So the participation that you had in mind then was the participation or the right to tell the School Board the views that you had and wanted to see them adopt, is that right?

A. Again, partially correct. Counselor, I wanted to tell them the concerns and the desires that existed in the minority community. I wanted to tell them how the minority community felt about the issues of the Bossier Parish School Board.

[81]

Q. All right, sir. Now in any public School Board meeting, as I recall you can sign a book outside which indicates that you want to speak to the board, is that correct?

A. That is correct.

Q. Now, sir, during this period of time during this redistricting, did you ever appear before the School Board?

A. I appeared before the School Board on numerous occasions, and again, I want to emphasize that we initially requested this in March of 1992, and that the reason why we requested this was to have a written response from the School Board so that when these meetings were held our presence and our presentations would be a matter of record.

Q. Well, did you get to make those presentations?

A. We always had an opportunity to go before the School Board, and—

Q. Well—

A. I am sorry, go ahead.

Q. No, I interrupted you, Mr. Price, I am sorry.

A. Okay. Yes, we went before the School Board, and when we finished they would say, thank you, and they would go to the next agenda item.

Q. All right, sir. Did anybody ever deny you the right to address the School Board and present your concerns?

A. I have never been told that I couldn't speak.

Q. Let me ask you this. From time to time you have given [82] complaints about the school system to Superintendent Lewis, have you not?

A. Again, I have spoken with the superintendent on numerous occasions.

Q. And sometimes you gave him a written list of complaints, have you not?

A. Every presentation that I have made before the School Board, I provided the School Board with copies.

Q. I am asking you about Superintendent Lewis?

A. If I met with Superintendent Lewis, I gave him copies.

Q. One of your concerns has been that they didn't hire enough black teachers, isn't that correct?

A. That is correct.

Q. All right. Mr. Lewis tells me that he invited you to go along with them on one occasion when they were trying to recruit black teachers. Did you go?

A. When did he ask me?

Q. That is not true then?

A. I said, when did he actually—

Q. I am asking you. He told me that he had. I am asking you if that is not so?

A. Well, may I explain when he asked me?

Q. Oh, sure.

A. He asked me after several presentations before the School Board, several written pieces of communication before [83] the School Board, and he asked me to go with the School Board on a day in which—I am fully employed, and I couldn't go. Yes, he asked me to go with them.

Q. All right. Now, Is it true that you requested of Superintendent Lewis that more black teachers be assigned to predominantly black schools to provide role models for the young students?

A. f you will excuse me for a second. I am looking for exactly what I requested, because it was in writing. I

requested that—in item D of a presentation that I made to the School Board, the development of a reassignment and a transfer program to insure parity or equalization of minority teachers at all schools. That is what I asked for.

Q. You didn't talk in terms of assigning black teachers to black schools as role models?

A. No, sir. I have always advocated black teachers to be in these places for children to communicate with and be there. I don't hold the perception that blacks are the only persons that should have role models. I believe that role models are important to all people.

Q. Thank you, Mr. Price, but really what I am asking is, did you in any way indicate to Superintendent Lewis that you would like to see more black teachers assigned to predominantly black schools as role models. That is all that I am asking you.

[84]

MR. BORKOWSKI: I would object that the question has been asked and answered.

THE COURT: Once more.

THE WITNESS: All right. What I Superintendent Lewis in a conversation that we had—we have several schools in Bossier Parish with no black teachers. I asked that those teachers could be reassigned so we could at least have black teachers at every school. That is what I asked as eluded to in my statement here.

THE COURT: All right. Anything else?

MR. THORNTON: Yes, sir.

THE COURT: All right.

MR. THORNTON: Not on that though. I am finished with that line of questioning.

THE COURT: All right. What else do you want to know?

BY MR. THORNTON:

Q. Well, I want to direct you to your narrative statement on paragraphs twenty-five and twenty-six. Do you have it before you?

A. I sure do.

Q. All right. Let me read twenty-five, and you follow me and tell me if I read it incorrectly. Twenty-five: It is a widely held perception in the African American community of Bossier Parish that it is pointless for any African American [85] who will stand up for the interest of the black community to run for office.

MR. THORNTON: That is paragraph twenty-five Your Honor, I am sorry.

THE COURT: I have got it.

BY MR. THORNTON:

Q. The perception is based on the knowledge of the population breakdown of the election districts, all of which are majority white, and knowledge of the dynamics between blacks and whites in the parish, specifically the wide-spread belief that most whites will not vote for a black candidate. In addition, there is a majority vote requirement in Louisiana elections.

Number twenty-six: Only three African Americans have been elected to significant political offices in Bossier Parish from majority white electoral districts. Johnny Gipson was elected to the Police Jury in 1975. He had a reputation for speaking out about issues of concern to the African American community.

He served one term, being defeated in 1983 by

Jerome Darby, another African American who has been reelected twice since 1983. In addition, Jeff Darby, his brother, was formerly a member of the City Council of Bossier City, but was defeated by a white candidate in the last election.

Neither of the Darby brothers is a member of the NAACP [86] or the Concerned Citizens Association, nor has either brother attended meetings or associated with either organization—with either organization in any way.

It is a widely held perception in the African American community of Bossier Parish that the only way that an African American can have a chance to get elected from a majority white district in the parish is by keeping a low profile with regard to racial issues, and not belonging to or being associated with organizations such as the NAACP or the Concerned Citizens.

Let me ask you some questions about those statements.

A. And I would like to just make the statement that I stand by every word of that.

Q. Good, good. Now, Mr. Price, do you think that race ought to be an issue in an election?

A. Sir, I don't think that race ought to be an issue, but you and I both know it is.

Q. You are speaking for the black community, Mr. Price. Please don't speak for me.

A. Well, I can only assume that you are aware of how things are in America.

Q. Mr. Price, is it your idea that a black who is elected to office ought to represent only the blacks in his constituency?

A. No, sir.

[87]

Q. Do you condemn the Darby brothers—

A. No, sir.

Q. —for not making race an issue?

A. No, sir.

Q. And yet I would treat your account of this as being very critical of them for not being—or standing up, as you put it, for black citizens?

A. I haven't seen any in my statement—

THE COURT: Objection sustained.

THE WITNESS: I haven't seen anything in my statement that mentions race.

THE COURT: He objected. I sustained the objection. He stood up and objected.

MR. THORNTON: I didn't hear anything.

BY MR. THORNTON:

Q. The only way that an African American can have any chance to get elected from a majority white district is by keeping a low profile with regard to racial issues. What did you mean by keeping a low profile, of not making race an issue?

A. I believe that it is identified in that statement as I said, by speaking out on racial issues, or being members of the organizations that are identified in the statement.

Q. Mr. Price, you stand by this statement you said, every word of it?

[88]

A. Yes, sir.

Q. All right, sir. Mr. Price, when you have made any sort of complaints about the school system, had Mr. Lewis always accepted what you gave him?

A. Mr. Lewis has always accepted what we gave him, but not yet responded to what we gave him.

Q. Well, did he explain to you the problem as he explained to the court of trying to hire more black teachers? Is that the first time that you ever heard his explanation?

A. No, sir, it is not. But we went before the School Board and presented a list of concerns from the black community. We asked that they respond to those concerns. After several weeks of no response, we went back again and asked what happened to those concerns?

They asked us to provide a list of solutions to our own concerns, or to give them some ideas of how these things could be done. We did that after much research. We did that. We submitted what we considered partial solutions to our concerns, and that did include a recommendation on how to recruit more black teachers. Yes, sir, we did that.

Q. All right, sir. Let me ask you what was your solution? You have Superintendent Lewis in the back, and I know that he is retiring, but tell him, tell the court what you want him to do that he hasn't done?

A. Again, counsel, I want to make clear of what I am [89] saying. I am saying that as we went before Bossier Parish School Board, we always submitted suggestions and concerns. We never submitted goals. In my statement we identify what could be done—what, in our opinion, could be done to recruit more black teachers. Let me see if I can find it quickly.

On page eleven of my testimony. The main areas of concern about school operations are as follows. Develop an early recruitment for black teachers, diligence in recruiting, hiring, retaining, and promoting African American teachers.

Those were our concerns. Let me see if I can find our solutions—our recommendations rather. I am not able to find it, but I believe that it is a matter of record. If I could have—

Q. Let me just ask you this—

A. Just a minute. I have them here. I have them here.

THE COURT: What page?

THE WITNESS: Suggested solutions in my testimony, sir.

THE COURT: Page and paragraph what?

THE WITNESS: I don't see a number on there.

MR. BORKOWSKI: Your Honor, that is at twelve A.

THE COURT: Thank you.

THE WITNESS: I said the Coalition of Bossier [90] Parish, Concerned Citizens of Bossier Parish, Men's Club, Concerned Citizens of Plain Dealing and Bossier Parish branch and NAACP suggested solution to our concerns to Mr.—

MR. THORNTON: Wait a minute. I am still looking for that. That is exhibit what?

THE COURT: They are not labeled as exhibits in the attachments to the statements furnished the court.

MR. THORNTON: Can you show it to me?

MR. BORKOWSKI: Yes, sir, absolutely.

THE WITNESS: Counselor, this suggested solutions to our concerns was addressed to then President Barry Musgrove, and this information or response is provided to you as a follow up to our presentation on July the 15th.

The Executive Committee of Bossier Parish Branch of the NAACP, and other organizational leaders, met on July the 20th, 1993, to discuss the best method of previous recommendations to you that we feel will improve certain areas of our school system.

We hope that the recommendations contained herein will assist you, Superintendent Lewis, and other School Board members in formulating solutions to our concerns. And then we went on to name our recommended solutions.

And in item two the issue of teacher recruitment concerns us greatly. We feel strongly that additional efforts can result in the placement of additional minority [91] teachers into the Bossier Parish school system. The following steps may help. Expand the area of recruitment to include—

BY MR. THORNTON:

Q. Mr. Price, let me interrupt you. We have it—the court and I have it before us.

A. Well, I wanted to make sure that you understood it.

Q. I think that the court has, too. Let me ask you some questions about them, unless the court wants you to read them all into the record.

THE COURT: No. They are already in the record as a part of his testimony—direct testimony. Sir, you don't have to read them again, because the court has them before it, unless you want to read it.

THE WITNESS: Well, sir, I wanted to point out a couple of things.

THE COURT: All right. Why don't you do that, because this is an important matter for you and for all of us.

THE WITNESS: Yes, sir. And item G of this—on these recommendations, we ask the insurance that the School Board show compliance with the 1970 consent decree which requires a seventy-five/twenty-five high end ratio until requirements are met.

Currently, we are not in compliance with that [92] requirement by the courts, and that simply meant that for every hundred teachers hired for Bossier Parish, twenty-five should be black, and seventy-five should be white, until the School Board was in compliance with the consent decree, and that is why we were very concerned about that issue as we present it in this particular document.

BY MR. THORNTON:

Q. Now, Mr. Price, let me ask you about this. You heard Mr. Lewis this morning, did you not, answer the court's questions about how he goes about trying to recruit black teachers?

A. Yes, sir. He said that he goes to Grambling and Louisiana Tech.

Q. Well, I think that he talked about LSU as well, did he not?

A. But as you notice in our recommendations, we included some of the southern black—predominantly black colleges in the State of Louisiana such as Southern in Baton Rouge, Xavier, and Dillard in New Orleans,

and we expound on that, and we made some recommendations on how that could be done.

Q. You think that he is not going to enough schools, is that it?

A. Yes, sir. This document, I think, speaks for itself.

Q. He also talked about the difficulty of hiring because of salary gaps with neighboring parishes. Do you think that [93] that is a concern?

A. Well, we have talked about that even before the School Board. Now, my concern is the dilemma there. If whites have—

THE COURT: Wait a minute, your concern is what, sir?

THE WITNESS: I have a dilemma with his explanation of why he can't hire blacks. Your Honor, there is no problem to hire white teachers in Bossier Parish, and I asked the question at the School Board meeting, are you all paying them different? Do white teachers make more than blacks? He said no.

I said, well, why don't you have a problem if salary is a problem hiring black—I mean white teachers. You always have white teachers. He said, well, I don't know. But the question still remains, if the salary in Bossier Parish is low, why is there no problem recruiting white teachers, only black teachers?

And what I have been told by black teachers is that the reason why they don't come to Bossier Parish, they cannot get promoted. They are not treated fairly in the system, and they have to leave, because they come in and see white teachers come in that they know received certification after them, and they rise to higher positions in the system, and the blacks that have been there do

not get those [94] opportunities, and they seek them elsewhere. That is one of the things that we have expressed as a concern.

BY MR. THORNTON:

Q. Well, Mr. Price, if that is true, then shouldn't motions and petitions have been filed in the *Lemon* case to protest that?

THE COURT: Mr. Thornton, how can—this is a lay person. He may be a leader in the community, and nobody doubts that—and nobody doubts that, I don't think. At least the court doesn't doubt it.

THE WITNESS: Thank you, Your Honor.

THE COURT: But he is not supposed to pursue everything in the world through the courts or whatever, is he?

MR. THORNTON: I think he is.

THE COURT: Well, maybe you do.

MR. THORNTON: They certainly have attorneys to do that.

THE COURT: I don't know whether they do or whether they don't. The issue in this case is whether the Attorney General of the United States properly denied preclearance of the districting plan for the election of School Board in 1993 for the Bossier Parish.

That is the issue. It doesn't have anything to do with whether he has filed a motion to supplement the record, [95] or to intervene, or to get some further relief in a school desegregation case. That doesn't have anything to do with that, does it?

MR. THORNTON: Your Honor—

THE COURT: Does it? Does it?

MR. THORNTON: Well, with all due respect to the court, yes, it does.

THE COURT: All right. Thank you very much. If it does, I will take your word. You can say that it does, and you can give me a memorandum showing me why. All right, next question.

MR. THORNTON: All right, sir.

BY MR. THORNTON:

Q. Do you think, Mr. Price, that the disciplinary system falls more heavily on black students than on white students in Bossier Parish?

A. Without question it does.

Q. Have you ever attended one of those hearings?

A. I have had numerous members of the NAACP request that I go, and I have been asked not to come on some occasions by some of the School Board people, that they could handle and resolve that issue. I have not attended a School Board hearing with any parent.

Q. Is it your testimony that you have been told that you have been discouraged from attending any of those hearings, [96] and if so, by whom?

A. By School Board officials.

Q. By whom?

A. By Joshua Bryant. By the personnel man in Bossier Parish, oh, what is his name?

Q. What reasons did they give you?

THE COURT: Well wait a minute. Let him think. Don't jump on him.

THE WITNESS: That they would resolve the issue.

That they would resolve the issue. And might I say in my opinion, and I am speaking from my opinion now, that these issues are things that they would rather not have public concerning the treatment of the students in the system, so they would refrain from any opportunity of making allegations of mistreatment of students, especially black students, a public issue. And they will tend to resolve that.

BY MR. THORNTON:

Q. And the people who told you this, were they black or white?

A. They are black.

Q. All right. You heard Mr. Lewis outline the procedure for disciplinary action in the Bossier Parish School Board. Do you think that that is a fair system?

A. It may have the mechanisms in place to be a fair system, but again, my opinion is that it is not a fair system.

[97]

Q. How would you make it more fair?

A. Well, I would certainly have people that have legitimate concerns and complaints heard, and I would certainly look into—and let me just emphasize on what I am talking about here, too.

We went before the School Board and asked for statistics on expulsions, on disciplinary actions, on kids being put in the GASP program, on the low scores of black students, and they have told us that they don't keep those statistics according to race.

But yet we know that there is some differences between the number of black expulsions and retentions that they have in the system than there are as they

apply to the white students. They told us that they do not keep those according to race.

Q. You are telling this court and me, under oath, that there are different standards for disciplining white from blacks in the Bossier Parish school district, is that what you are saying?

A. I am telling you my opinion, and my opinion is, yes, it is.

THE COURT: And that African American people, or students rather, excuse me, are treated more severely?

THE WITNESS: Yes, sir.

THE COURT: Than white people?

[98]

THE WITNESS: Yes, sir.

THE COURT: All right.

THE WITNESS: For the same offenses.

THE COURT: Correct. I understand your position and testimony.

MR. THORNTON: I have just a question or two, Your Honor.

BY MR. THORNTON:

Q. During the redistricting process, Mr. Price, do you know of any group representing any—or claiming to represent any group of people, black, or white, or so forth, who had any more participation in the plan and the reapportionment process than the Concerned Citizens or the NAACP?

A. Counselor, when you say participation, let me tell you what my definition of participation is. Participation to me is not coming to the board and presenting an

optional plan and leaving. Participation is trying to find out what they can do as board members that were duly elected to represent us to address these concerns.

Nobody never came to us and sat down with us and said, what can we do as your elected board members to do something about your concerns? They let us make presentations, and as I said a few moments ago, after we made the presentation they said, thank you, and they went on to the next agenda item. Now, I don't know what you mean by participation. I don't [99] consider that participation. I consider that coming and making a presentation.

Q. All right. Now, do you know of any other groups, any groups whatsoever, in which any School Board member went to see and asked about the redistricting plan?

A. I know that there was some people there from the Concerned Parents of Plain Dealing. I know that there was some people there from the Tenant Coalition, and I know that there was some people there from the Bossier Parish Voter League, all of whom the presidents of those particular bodies elected me as their spokesperson, and was in agreement with the letters and the documents that I presented. I don't know what else—how else I can answer you on that.

Q. Well, I guess the only question, Mr. Price, was in the participation. Do you know of any group that participated any more actively than your presentation, or who sat in on the meetings that adopted the reapportionment plans? If you do, tell us who they are?

THE COURT: What year are you talking about? 1991?

MR. THORNTON: 1992, 1993, and even into 1994.

THE COURT: Wait a minute. I am the Judge here. I have got to decide this case. Now, you are talking about a 1991 plan, or was there one in 1992, or just action on a 1991 plan in 1993? Now what are you talking about?

MR. THORNTON: I am talking about the deliberations [100] of the School Board in 1992.

THE COURT: All right. That is different than 1991 and 1993. What did they do in 1992?

MR. THORNTON: And on into 1993.

THE COURT: What did they do? Did they adopt a plan during that period?

MR. THORNTON: They adopted a plan during that period.

THE COURT: The School Board?

MR. THORNTON: The School Board.

THE COURT: For election of its members?

MR. THORNTON: On the time schedule—I think it was in September of 1992.

THE COURT: All right.

THE WITNESS: October, October.

MR. THORNTON: October of 1992.

THE COURT: Thank you, sir. You are helpful.

THE WITNESS: Thank you.

MR. THORNTON: Do you want me to restate my question now?

THE WITNESS: Yes.

THE COURT: Well, we have got to keep it in focus, Mr. Thornton.

THE WITNESS: Yes.

BY MR. THORNTON:

[101]

Q. Do you know of any group, any group of citizens, any private group, not the School Board members but any private group who sat in on the deliberations with the School Board when it was discussing the adoption of a reapportionment plan?

A. Let me reemphasize to you what happened. Again, the major black organizations in Bossier Parish elected me as their spokesperson.

THE COURT: You have said that.

THE WITNESS: All right. We came to these meetings and made presentations. We did not sit in on deliberations or decision making as the plan was adopted. We made presentations.

When the plan was voted on, the night that the plan was voted on, we had a map on display, as well as the Bossier Parish School Board had a map on display. After our presentation at the public hearing, they moved on to adopt their plan.

Now, I don't know what you mean by participation. You keep using that word, but I have a difference—a different idea of what participation is and what presentations are.

MR. THORNTON: May it please the court, I know that I am taxing the patience and time of the court, but I am not getting answers to my questions.

[102]

THE COURT: Overruled. You may not be getting the answers that you want, but you are getting answers. So that is it.

MR. THORNTON: Well, in that case, Your Honor—

THE COURT: What else can you do about it? Nothing.

MR. THORNTON: I can give up I guess on this witness.

THE COURT: I believe that you could. It is your option.

* * * *

Testimony of Defendant-Intervenors' witness George Price—Redirect Examination by the Defendant-Intervenors

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[102]

* * * *

Q. Mr. Price, after you sent this letter to the School Board asking to participate in the redistricting process, you weren't given any information, were you, about any work session that the School Board had with Mr. Joiner to look at options or work on a plan, were you?

A. No, sir. No response at all.

* * * *

Testimony of Defendant-Intervenors' witness David Arnold Creed—Cross Examination by the Plaintiff

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[115]

* * * *

Q. You say that it has been a common practice in Louisiana to cut and split precincts?

A. Yes, sir. To my knowledge, and I am confident that that is true.

Q. Oh, I think it is. And there is a state law that you are aware of, are you not—

A. Yes, sir.

Q. —that prevents that?

[116]

A. Act 925, that is right.

Q. But the Police Jury sometimes accommodate other subdivisions by splitting precincts?

A. Yes, sir. And all of the cases that I know about they have accommodated.

Q. Do you know of any law, or have you been told of any court decision or any law that says that a Police Jury can violate or set aside the state law for these purposes?

A. Well, I —

MR. BORKOWSKI: He is assuming facts that are not in evidence.

THE COURT: Overruled. I will let him answer.

THE WITNESS: Am I aware of any laws at all?

MR. THORNTON: Yes.

THE WITNESS: That would allow —

BY MR. THORNTON:

Q. My question, Mr. Creed, is when you are doing these, you don't know—or do you basically know whether what you are doing is legal in Louisiana or not?

A. I believe that it is legal, yes, sir.

Q. All right. On what basis do you believe it?

A. Because I have found nothing in the law that it violates any laws anywhere, and because I have done—counting the one that I am working on now, I have done —that makes fifteen, and they have all been precleared, and accepted, and [117] elections have been held, and people now hold their positions, and I guess that I am assuming that it is legal.

Q. You are assume that it is legal?

A. Yes, sir.

Q. All right. Now then, you state some opinions about gerrymandering?

A. Yes, sir.

Q. And your opinion is that this—well, not this plan, but the plan that was—the plan that the Bossier Parish School Board presented and is before this court, you are saying that that is a gerrymandered plan?

A. No, sir.

Q. Well, are you saying that Mr. Cooper's plan is gerrymandered?

A. No, sir.

Q. So you see no gerrymandering at all?

A. Everyone seems to have a different definition of gerrymandering here.

Q. What is yours?

A. My definition—it is in my written testimony, but generally that you would take a geographical area and draw an area in order to create a district for an elected body that would take all kinds of twists and turns and be what I said was tortuous and convoluted in order to arrive at whatever goal it might be that you are trying to arrive at in drawing [118] the districts. That is gerrymandering to me.

Q. Would gerrymandering be the opposite of sound demographic principles?

A. It would not be consistent with sound demographic principles.

Q. All right. If you have sound demographic principles and use them, you would not have a gerrymandered district, would you, is that fair enough?

A. That is fair.

Q. And you don't find that there is gerrymandering in any of these plans?

THE COURT: Which plans? Any of—there are so many that we are talking about here, I want to know which ones you are asking about?

BY MR. THORNTON:

Q. The School Board, and have you seen the Cooper two plan?

A. I understand that there is a NAACP plan. I have not seen that plan.

Q. All right. You have seen the Cooper plan?

A. I have seen one called the Cooper plan.

Q. And you have seen the one that we call the Police Jury plan that is before this court?

A. Yes, sir.

Q. And you find no gerrymandering in either of those?

A. I find it to be about the same as most of the plans that [119] I have seen developed and approved.

Q. All right, sir. I had one other question and it slipped my mind. Just a moment. Oh, the question was, sir, in all of the precinct splitting of plans that you helped to get to preclearance, what is the largest number of precincts that you have ever split?

A. Eight.

Q. No more than eight?

A. No, sir.

MR. THORNTON: No further questions, Your Honor.

THE COURT: When did you draw—no further questions?

MR. THORNTON: From me.

THE COURT: Do you have any?

MR. BORKOWSKI: No, Your Honor.

THE COURT: Are you finished?

MS. HUME: Yes, Your Honor.

THE COURT: All right, Mr. Creed, let me ask you a question.

THE WITNESS: Yes, sir.

THE COURT: You say that you have in the course of over the last fifteen years I gather—

THE WITNESS: Yes, sir.

THE COURT: —have drawn a large number or a substantial number of boundaries, geographical boundaries for [120] the election of various entities or political—

THE WITNESS: Yes, sir.

THE COURT: — groups?

THE WITNESS: Right.

THE COURT: Throughout the State of Louisiana?

THE WITNESS: Throughout northeast Louisiana is where—I am located in Monroe Louisiana, and Louisiana has eight planning and development districts which cover the state, and the one that I am the director of covers the northeastern part of the state. And like I said, I am in Monroe. The ones that I have done have been in that part of the state.

THE COURT: Is that the same part that we are talking about here?

THE WITNESS: No, sir. That is the northwestern part.

THE COURT: All right. Mr. Thornton told me that yesterday. Were you here yesterday?

THE WITNESS: Yes, sir.

THE COURT: Did you hear the testimony that there is a Louisiana state law that says that you can't modify or cut across precinct lines?

THE WITNESS: Yes, sir.

THE COURT: Under Louisiana state law in order to accomplish and establish a redistricting plan?

[121]

THE WITNESS: Yes, sir. I have a copy of the law.

THE COURT: How many times have you had to do that in the course of your work, cut across or split up a precinct, an existing precinct line?

THE WITNESS: In order for School Boards, I have done it three times.

THE COURT: All right.

THE WITNESS: But for municipalities I would have to count them up. I would say about five ot six times.

THE COURT: And the same Act 925 applies to municipalities as it does to School Boards, doesn't it?

THE WITNESS: I don't think it does.

THE COURT: Or does it?

THE WITNESS: I don't think that it does.

THE COURT: All right. What about Police Juries?

THE WITNESS: No, sir. I think that it only applies to School Boards, and in large Police Juries, it is a technical question or interpretation as to are they splitting or creating precincts, because once they do the splitting in—

THE COURT: Who is they?

THE WITNESS: The Police Juries. Once a Police Jury in its own reapportionment effort splits precincts and then by legal description, and by mapping, and by ordinance creates this new plan, then they have created new precincts. [122] So they have split, but they create at the same time. I hope that I am making myself clear.

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Testimony of Government's witness Jerome Blunt—Cross Examination by the Plaintiff

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[106]

* * * *

Q. When you were on the School Board, Mr. Blunt, did you have much contact with Mr. Price or any of the other leaders of the black community?

A. I don't quite understand your question. When you say contact, do you mean at regular board meetings?

Q. No, sir. I mean outside of board meetings. Were you close to those groups?

A. No. I would say no, I wasn't close.

Q. Did they ever talk to you at all about their concerns in the school system?

A. At the board meetings, yes.

Q. How about outside of the board meetings?

A. No, they didn't.

Q. They didn't ask you, for example, to go to the superintendent and talk about hiring black teachers?

A. No.

Q. They didn't come to you as a black School Board member and ask you to look into the disciplinary mechanism in the school system?

A. No.

Q. They didn't come to you and ask you about assigning black teachers to black schools as role models?

A. No.

[107]

Q. Why do you think that they didn't do that, Mr. Blunt?

A. My personal opinion on that, Mr. Thornton, is that Mr. Price and the coalition have been fighting this fight for a long time. They had information that—they are long-time Bossier residents, so they knew the ins and outs of the school system, and they knew, in fact, what the minority community wanted and needed.

Q. But you were sort of an insider at that point, sort of on the School Board?

A. That is right.

Q. I would have thought that they might want you to lead or to pinpoint their concerns within the school administration. They didn't ask you to do that?

A. No. I would like to explain that answer. The African community in Bossier Parish is concerned about various things in the school system, but also we have our own things that we are concerned about now.

My role as a School Board member was to represent District K, the district that I was concerned. Now, I was also, concerned about all of the members of the parish also, too. As a School Board member then, my concern is the entire parish and my district.

Q. Did you consider, then, that you really represented the whole constituency, and you were interested in the betterment of that district and the School Board system, is that [108] correct?

A. Absolutely.

Q. You didn't think that you just represented blacks, you thought that you represented everybody, is that correct?

A. That is correct, but I would like to expand on that answer.

Q. All right, sir, by all means?

A. Okay. I represented the whole school system. I think that that is foremost. But when there is a population that seems excluded, that does not seem that they are a part of the system, then my role also as a board member is to look into those concerns and to talk with those people about those things.

Q. And did you?

A. I was aware of those things at the board meeting. When I was on the board, a lot of those things were already in place. As Mr. Price had talked to earlier, he had asked to be on the process early in 1992. My appointment started in September of 1992.

* * * *

[109]

* * * *

Q. When you ran for reelection, did Mr. Barry Musgrove give you any assistance in running?

A. I asked Barry Musgrove, and he gave me some information, but when I asked for support from my fellow colleagues as an incumbent, all of them were basically afraid to come out and say that I am supporting Jerome Blunt, because they were worried about the persecution if they—of their constituents maybe, and the persecution of the person who maybe would replace me.

Q. In other words, they didn't take a real active part, but they did—Mr. Musgrove gave you some advice, did he not? I mean—

A. Yes.

[110]

Q. I mean seemed friendly to your campaign?

A. Yes.

Testimony of Defendant-Intervenors' witness Thelma Harry—Cross Examination by the Plaintiff

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[132]

* * * *

Q. Ms. Harry, how many seats do you believe that the black [133] community should have on the Bossier Parish School Board?

A. I would like to see them have three.

Q. All right. And why do you think that they should have three?

A. Because there are twelve now, and if you have three, we could depend on at least two to get some of our concerns through.

THE COURT: Two out of twelve would be able to do it?

THE WITNESS: Well, I want a back-up system.

BY MR. THORNTON:

Q. Do you think that the seats should have any relationship to the black proportion of the population?

A. I do.

Q. Have you been told that by anyone?

A. No. That is my own function.

* * * *

Testimony of Government's witness Johnny Gipson—Cross Examination by the Plaintiff

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[138]

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Q. Wait a minute, let me finish my question for the record. On the School Board, how many seats do you think that the black community ought to have? Now go ahead.

A. At least two, based on the population given, about two.

[139]

Q. Based on what, sir?

A. On the population, two.

Q. The percentage of blacks of the population?

A. Yes.

* * * *

Testimony of Government's witness Jeffrey Dewayne Darby—Cross Examination by the Plaintiff

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[145]

* * * *

Q. Mr. Darby, how many seats do you think that the black community deserves to have under the Voting Rights Act on the Bossier Parish School Board?

A. Sir, unrealistically I wish that we had six. But realistically, two.

Q. And why two?

A. To represent the population of Bossier Parish, the minority population.

Q. Because that is their proportion to the entire population?

A. (Nodding head.)

Q. You have to speak out, sir?

A. Yes, sir.

Q. Mr. Darby, remind me, I couldn't find it right quickly. When did you run for the City Council?

A. 1989.

Q. And you won that seat, did you not?

A. Yes, sir.

Q. Was that from a predominantly white district?

A. Yes, sir, it was.

Q. What was the racial composition of that district?

[146]

A. Approximately twenty-two percent minority, and the rest majority.

Q. Seventy-eight or something like that?

A. Um-hum.

Q. And how many votes did you win by?

A. Approximately thirty votes.

Q. Did you make race an issue?

A. No, sir.

Q. Did you make—as an issue did you make the concerns, or what we would call the real issues of the election a part of your campaign?

A. I am not understanding your question.

Q. Well, I am not saying it very well, either. The issues of the campaign, were they—other than racial, I mean what the community ought to do, what the Police Jury ought to do about the problems, that sort of issue, is that what you ran on?

A. Yes, sir, pretty much.

Q. Okay. And in the meantime, after you had been elected, but before you ran again, the City Council changed their districts, did they not?

A. Yes, sir.

Q. That was after the Police Jury had changed its districts?

A. Yes, sir.

[147]

Q. And you were not, I think, happy with the district which—or which was drawn around your residence?

A. This is correct.

Q. But you ran and you lost, did you not?

A. Yes sir.

Q. Lost to what, Mr. Swayer?

A. Right.

Q. Who was white?

A. Yes, sir.

Q. And how many votes did you lose by?

A. Between fifty and fifty-eight.

* * * *

Testimony of Government's witness Dr. Richard L. Engstrom—Cross Examination by the Plaintiff

* * * *

[151]

* * * *

Q. You have told us in your declaration what methodology you used to come to the conclusions that you came to, and the conclusions appear to be, sir, that in your opinion people in Bossier Parish vote by race, is that correct?

A. I believe that the conclusion is that in the election that I have studied, there is evidence that voters divide along racial lines.

Q. Okay. I stand corrected. Is that a fair statement, what you are telling us?

A. In the elections in which I was—I believe I was able to determine candidates of choice, that tends to be the case, yes.

Q. Okay. I want to ask you some questions about this study that you made of Bossier Parish. How many times have you been to Bossier Parish?

A. Oh, I don't know the total number, but it wouldn't be very many.

THE COURT: What do you mean by that?

THE WITNESS: Maybe two or three times, not connected to the study.

[152]

THE COURT: What did you do there?

THE WITNESS: Went to a famous barbecue restaurant I remember the last time.

THE COURT: In Shreveport?

THE WITNESS: In Bossier City. I was in Shreveport and specifically went to Bossier City for barbecue. I did not go to Bossier Parish for the purpose of the study, and I am from New Orleans, so I am not up there too often.

BY MR. THORNTON:

Q. Of any of the political contests that form a part of your study, I want to ask you some questions about them. Did you ever talk to any of the candidates?

A. For the purpose of the study?

Q. Yes?

A. No.

Q. Did you ever make a study of what the issues of the political—

THE COURT: Wait a minute, you didn't get an answer to the first question. Did you ever talk to the candidates?

MR. THORNTON: I think he said no.

THE COURT: Oh, I didn't hear.

THE WITNESS: Not for the purpose of the study. I have met some since and I have talked with them, but not prior to preparing this, nor for the purpose of preparing this study.

[153]

THE COURT: All right. I am sorry. I didn't hear you.

BY MR. THORNTON:

Q. Do you know what the issues, campaign issues

were, in any of those elections that you have talked about?

A. No, I do not.

Q. Did you make any study of what kind of campaign organization each of the candidates might have put together?

A. No, I did not.

Q. Did you have any idea of how much money they might have had in their political coffers to get across their programs?

A. No, I did not.

Q. Do you happen to know whether any of them had debates at a public forum and a face-to-face confrontation with the public?

A. No, I do not.

Q. Did you happen to know anything about the backgrounds of any of those candidates in terms of political experience or education?

A. Not for the purpose of assessing racial divisions and voter candidate preferences, no.

Q. All right. Ought those factors that I have asked you about, and other factors, don't they sometimes have some sort of impact on the outcome of political campaigns?

A. There are all sorts of things that can have an impact on [154] the outcome of political campaigns. I was addressing a specific research question, did African American voters and non-African American voters in these elections, in which they were given a choice, between or among African American and white candidates, have different candidate preferences, and to

answer that question, I don't need to do all of these other things that you are asking me about.

Q. All right, sir. Tell me this, then. Have you ever examined any parish in Louisiana, or any county anywhere in the United States, in which racial preference doesn't have some impact on the outcome of the election?

A. I can't recall doing—I mean doing an analysis of one in which there wasn't some impact, in which voters didn't divide along racial lines, certainly, to some extent.

Q. You have a doctor of philosophy in the field of political science, do you not?

A. That is correct.

Q. And so within your area of opinion, do you have any benchmark in which you can compare Bossier Parish with any other parish or county as to whether racial preference affects the outcome of political campaigns?

A. Well, I haven't been asked to make that comparison, so I haven't come up with a benchmark, and I haven't even thought about what the benchmark might be if I needed one.

Q. Well, if other parishes and other counties allowed [155] racial preference to have impact on election results, and you tell me that Bossier also has, how have we advanced human knowledge by that fact?

A. Well, I don't know if we have advanced human knowledge through my study. It may be very well that the people in the audience find that I have documented the obvious in this analysis, that African American voters in Bossier Parish vote for African American candidates usually when given that choice, and white voters

do not. I mean I don't know that I have advance knowledge, but those are the results of my studies.

Q. But you don't know any other area that doesn't have a certain amount of that, do you?

A. Well, I don't know what you mean by a certain amount of that, and I haven't studied all areas. Usually when I do these types of analyses, it is in the areas in which there are voting rights issues. So it is not uncommon to find this. In fact usually this is the case.

Q. Well, you are a political scientist. Isn't it true that sometimes Catholics won't vote for Protestants?

A. Excuse me, Catholics will vote for Protestants?

Q. I say—listen to me, Doctor.

A. Okay.

Q. Isn't it true that in—just in your experience, and certainly in your area of academic excellence, isn't it [156] sometimes true that Catholics don't vote for Protestants, or Protestants don't vote for Catholics?

A. Oh, I suppose that that is sometimes true. However, not anywhere to the extent that we have racial divisions. Race is the major demographic variable in American politics.

Q. Everywhere—

A. There is no other division in American politics that even comes close to it.

Q. Everywhere—

THE COURT: Did you ever hear of Mayor Daley in Chicago?

THE WITNESS: Me?

THE COURT: Yes.

THE WITNESS: Have I heard him?

THE COURT: Have you ever heard of him, I said?

THE WITNESS: Senior or junior? The current one or the previous one? I have heard of both.

THE COURT: Both.

THE WITNESS: Okay.

THE COURT: Did you ever hear of a man named Boss Hague in Jersey City, New Jersey?

THE WITNESS: Yes.

THE COURT: Did you ever hear what used to happen the Sunday before elections in every Catholic parish in Jersey City?

[157]

THE WITNESS: Well, I don't know for sure, but I assume that there was probably a visit to the church.

THE COURT: I said in every Catholic parish?

THE WITNESS: No.

THE COURT: It was a visit to the church. Did you ever hear what happened in those churches?

THE WITNESS: I guess that I have not heard that.

THE COURT: You haven't, and you have a Ph.D. from the University of Kentucky? No wonder they didn't win the basketball tournament this year. I just thought of those two examples as a result of his questions. You have not heard of that kind of discrimination?

THE WITNESS: No. I mean I don't know what happened at Catholic parishes a week before elections, or the Sunday before elections in Jersey City, no.

THE COURT: You don't know anything about—

THE WITNESS: I am fairly familiar with Chicago, but—

THE COURT: What happened there?

THE WITNESS: When, before elections?

THE COURT: Yes. What happened in 1968 there, or late 1960 there?

THE WITNESS: I don't recall what happened in 1960.

THE COURT: All right. I was thinking about the presidential election in 1960.

[158]

THE WITNESS: Oh,

THE COURT: You are a political scientist.

THE WITNESS: Well, I mean—I assume at that point you are talking about late election returns being reported.

THE COURT: I am talking about the same subject that Mr. Thornton is asking you about, sir.

THE WITNESS: Whether Catholics vote for Protestants, or whether there are times when they don't? I mean—

THE COURT: Well, the question is there. I am not going to restate the question for you, sir. You either answer it or you don't answer it. I don't care. You do or don't.

THE WITNESS: Well, I thought you were asking if there were times when Catholics don't vote for Protestants, and I said that I suspect that that can be the case.

THE COURT: You don't know of any instance though, is that what you are saying?

THE WITNESS: When Catholics didn't vote for Protestants? Catholics voted for Kennedy in 1960, but not to the percentage, I don't believe, that we generally find African Americans voting for African Americans, nor were Protestants as opposed as we usually find along racial lines. I still maintain that race is a far more serious demographic [159] division in American politics than religion.

THE COURT: All right, sir, thank you. I hear your opinion.

BY MR. THORNTON:

Q. Doctor Engstrom—

THE COURT: Please don't misunderstand me. The court has no opinion on this. I am just asking you for your knowledge.

BY MR. THORNTON:

Q. As a political scientist, do you have an opinion as to whether or not separating races and focusing on the differences, and assigning black majority and white majority districts on the basis, say, of proportion in the population, do you have an opinion as to whether that ameliorates and eases racial hostility, or would you think that it might increase or exacerbate hostility?

A. I believe that over time, if it provides African Americans with an opportunity to elect candidates of its—of their choice, I think that it will ameliorate it. I think that as we see African Americans elected to public office, and serving in public office, some of the fears of white voters will recede, and the horrible things that they may expect to result from the elections of blacks,

at least among some white voters, will recede into the background, and we will probably, at that point, hopefully in the future, begin [160] to have elections that are driven less by race.

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Testimony of Government's witness Dr. Richard L. Engstrom—Redirect Examination by the Government

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[166]

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Q. Doctor Engstrom, when Mr. Thornton was asking you about whether you conversed with the candidates, and visited the parish, knew anything about the campaign issues, is it a standard practice in your area of expertise and its statistical methodology in analyzing electoral behavior to look at these kinds of factors in your study?

A. It would depend on the research question being addressed. If one is trying to do a causal analysis of why voters vote the way that they do, then one would certainly go on and look at other variables.

But if one is simply addressing an empirical question, do African American voters and non-African American voters have different candidate preferences, then that is not the appropriate analysis.

You simply look at the voters, and the way that the votes have been cast, and using the best available data that you can obtain, see if there are indications of whether you can identify those candidate choices, and whether they are different.

* * * *

Testimony of Defendant-Intervenors' witness William S. Cooper—Cross Examination by the Plaintiff

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[177]

* * * *

Q. Now listen to me very carefully. In Cooper one and Cooper two, was your motive in drawing those districts as you drew them, and splitting the precincts as you have described, were you trying to draw it in such a way that there would be two majority black districts?

A. I was asked to assess whether or not it was possible to create two majority black districts using traditional redistricting criteria, and yes, that was the result.

Q. That was your instructions?

A. Right.

Q. All right.

THE COURT: What are the traditional criteria in [178] your view?

THE WITNESS: Well, in my opinion the three fundamental criteria are one person one vote, making sure that the deviation for a particular district does not exceed five percent, assuring that a district is contiguous. In other words, that all pieces are joined together.

And finally I think in an area where there is a significant minority population, you have to follow the Voting Rights Act and produce a majority black district, providing that it can be done. There are places where it cannot be done, but in the case of Bossier Parish I believe that it could be done there.

THE COURT: Is there anything about compactness?

THE WITNESS: Compactness is a very fuzzy term. I try to make the district as shapely as possible, but in point of fact you are frequently dealing with oddly shaped jurisdictional boundaries, oddly shaped municipal our county boundaries, I should say, oddly shaped precincts.

The distribution of population can be kind of unusual, so that it is really very, very difference to look at a plan and signal out a district and say that it is not compact or that it is compact without knowing a little bit more about what is beneath the lines so to speak.

THE COURT: So the court's use of the words compactness are not necessarily correct?

[179]

THE WITNESS: Well, I think that it is laudable goal, and I sort of know what compactness is, as we sort of know what beauty is and truth is, but it is very hard to define, and ultimately, I attempt to make a district as shapely as possible, as square and neatly bounded.

But I don't — I don't employee, for example, a measure of compactness to determine whether or not a district meets a certain compactness standard, nor do most governing bodies that I encounter. It is highly unusual to ever see a jurisdiction — in fact, I have never seen a jurisdiction produce a compactness measure as a part — as part of their redistricting process at the local level anyway.

* * * *

WEST'S LOUISIANA STATUTES ANNOTATED
LOUISIANA REVISED STATUTES (1995)

TITLE 17. EDUCATION

CHAPTER 1. GENERAL SCHOOL LAW

PART II. PARISH SCHOOL BOARDS

SUBPART A. ESTABLISHMENT AND ORGANIZATION

§ 52. Election and qualification of members; term of office

A. There shall be elected by the qualified voters of each parish police jury ward, or the equivalent thereof, of each parish of the state a member of the school board of the parish for each police juror in said ward, or the members of a parish school board shall be elected by the qualified voters in accordance with the school board reapportionment plan then in effect as authorized by law, or the members of a parish school board shall be elected in accordance with any special law applicable to the board, as the case may be. Members of parish school boards shall be elected at the congressional elections. Members elected in 1986 and thereafter shall serve four-year concurrent terms beginning January 1 following their election.

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WEST'S LOUISIANA STATUTES ANNOTATED
LOUISIANA REVISED STATUTES (1995)

TITLE 17. EDUCATION

CHAPTER 1. GENERAL SCHOOL LAW

PART II. PARISH SCHOOL BOARDS

SUBPART A-1. REAPPORTIONMENT AND REORGANIZATION

[The following is from the 1982 Main Volume:]

§ 71.3. Procedure for accomplishing reapportionment; special election districts; effective date of same

A. Each of the parish and city school boards shall use the federal census of 1970 as the basis upon which to accomplish reapportionment, provided however, that each of said school boards may authorize the taking of a special census to use as a basis for reapportionment. To this end, each of said school boards may employ qualified firms to take such special census, and may employ such other consultants, attorneys, etc. as it deems desirable in order to assist such board in such reapportionment.

B. Each of said boards, after determining the number of members of said board after reapportionment is to be effective, may create such special school board election districts as it deems desirable, which districts need not be coterminous with, nor have any relation to, the wards or precincts that may be created by the police jury or cities or towns within and for said parish or city, but any such special school board election districts created as a result of this Subpart must be compact and contiguous. The board may provide that all or part of its members shall be elected from such districts and may provide

that one or more of its members may be elected at large from each of such districts.

C. Repealed by Acts 1980, No. 285, § 9, eff. July 14, 1980.

D. The special school board election districts provided for herein shall be for the purpose only of electing school board members and shall not be for the purpose of levying taxes or issuing bonds. The creation of such special election districts shall not affect existing tax or bonding districts and same shall remain in full force and effect as otherwise provided by law.

Added by Acts 1968, No. 561, § 1. Amended by Acts 1970, No. 319, § 1, emerg. eff. July 13, 1970 at 2:00 P.M.; Acts 1975, No. 432, §1.

WEST'S LOUISIANA STATUTES ANNOTATED
LOUISIANA REVISED STATUTES (1995)

TITLE 17. EDUCATION

CHAPTER 1. GENERAL SCHOOL LAW

PART II. PARISH SCHOOL BOARDS

SUBPART A-1. REAPPORTIONMENT AND REORGANIZATION

[The following is from the 1995 Pocket Part:]

§ 71.3. Procedure for accomplishing reapportionment, special election districts; effective date of same

[See main volume for A]

B. Each of said boards, after determining the number of members of said board after reapportionment is to be effective, may create such special school board election districts as it deems desirable. These districts need not be conterminous with the wards that may be created by any governing authority, but any such special school board election districts created as a result of this Subpart shall be compact and contiguous. After January 1, 1984 the boundaries of such election districts shall contain whole election precincts established by the parish governing authority under R.S. 18:532 or 532.1. The board may provide that all or part of its members shall be elected from such districts and may provide that one or more of its members may be elected at large from each of such districts.

Amended by Acts 1982, No. 558 § 1, eff. July 22, 1982.

[See main volume for C and D]

E. (1) The boundaries of any election district for a new apportionment plan from which members of a

school board are elected shall contain whole precincts established by the parish governing authority under R.S. 18:532 or 532.1.

(2)(a) Notwithstanding the provisions of R.S. 17:71.3(E)(1) or any other law to the contrary, if a school board is unable to meet the federal guideline of plus or minus five percent deviation in the creation of its reapportionment plan through the use of whole precincts, the school board may, in the creation of its reapportionment plan, divide a precinct into portions which are bounded by visible features which are census tabulation boundaries. No such precinct shall be divided into more than two school board districts. No school board district shall contain more than two divided precincts.

(b) The provisions of this Paragraph shall be applicable only in cases in which the number of members of the school board is not equal to the number of members of the parish governing authority of the parish in which the school board is domiciled.

(c) The provisions of this Paragraph shall not be construed as authority for a school board which has adopted or accomplished reapportionment or is able to reapportion itself using whole precincts to divide precincts. Any plan adopted by a school board in contravention of this Subsection shall be null and void.

(d) The provisions of this Paragraph shall become null and void on December 31, 1992, unless a school board receives an objection letter to its reapportionment plan from the Department of Justice. In such event the school board shall use the provisions of this Paragraph to satisfy the objections of the Department of Justice if said objections would require a precinct to be divided and the provisions of this Paragraph shall be null and void after such reapportionment is complete.

(3)(a) Notwithstanding the provisions of Paragraph (1) of this Subsection or any other law to the contrary, if a school board is unable to meet the federal guideline of plus or minus five percent deviation in the creation of its reapportionment plan through the use of whole precincts, the school board may create school board election districts that subdivide one or more precincts. No such precinct shall be subdivided into more than two school board districts. No school board district shall contain more than two subdivided precinct portions in addition to any whole precincts contained therein.

(b) The provisions of this Paragraph shall be applicable only in parishes having a population of ten thousand or fewer according to the latest decennial census and in which there are fifteen or fewer election precincts.

(c) The provisions of this Paragraph shall not be construed as authority for a school board which is able to reapportion itself using whole precincts to subdivide precincts. Any plan adopted by a school board in contravention of this Subsection shall be null and void.

(d) The provisions of this Paragraph shall become null and void on December 31, 1993, provided that if the United States attorney general objects to the reapportionment plan of a school board operating under the provisions of this Paragraph, the school board may act under the provisions of this Paragraph to create a reapportionment plan to which the attorney general interposes no objection, if the plan would require one or more precincts to be subdivided. Following the adoption of such plan, the provisions of this Paragraph shall be null and void.

Added by Acts 1992, No. 925, § 1. Amended by Acts 1993, No. 286, § 1, eff. June 2, 1993.

WEST'S LOUISIANA STATUTES ANNOTATED
LOUISIANA REVISED STATUTES (1995)

TITLE 18. LOUISIANA ELECTION CODE

CHAPTER 5. PRIMARY AND GENERAL ELECTIONS

PART II. ELECTION OFFICIALS

SUBPART A. GENERAL PROVISIONS

§ 425.1. Consolidation of polling places; reduction of voting machines and election officials

A. Notwithstanding the provisions of R.S. 18:424 and 425 or any other provision of law to the contrary, in an election, including the election of any public official, where more than one polling place is within the same location, the parish board of election supervisors may consolidate polling places in that location for that election and may reduce the number of voting machines to be used in the election below the number fixed by R.S. 18:1363 and, in such case, shall notify the parish custodian of voting machines and the commissioner of elections of the number of machines to be prepared and delivered for the polling places so consolidated.

B. When the parish board of election supervisors consolidates polling places as authorized by Subsection A of this Section, it shall appoint a commissioner-in-charge to serve at each such consolidated polling place and may reduce to not less than two the number of commissioners and alternate commissioners to be appointed to serve at each such polling place.

Added by Acts 1986, No. 705, § 1.

WEST'S LOUISIANA STATUTES ANNOTATED
LOUISIANA REVISED STATUTES (1995)

TITLE 18. LOUISIANA ELECTION CODE

CHAPTER 5. PRIMARY AND GENERAL ELECTIONS

PART V. VOTERS AND VOTING

SUBPART B. PLACES FOR VOTING

§ 532. Establishing of precincts

A. Subject to the provisions of R.S. 18:532.1 and 1903, the governing authority of each parish shall establish precincts, define the territorial limits for which each precinct is established, prescribe their boundaries, and designate the precincts. The governing authority of each parish shall be ordinance adopt the establishment and boundaries of each precinct in accordance with the timetable as set forth herein and in accordance with R.S. 18:532.1.

B. (1) Each precinct shall be a contiguous, compact area having clearly defined and clearly observable boundaries coinciding with visible features readily distinguishable on the ground such as designated highways, roads, streets, rivers, or canals, except where the precinct boundary is coterminous with the boundary of a parish or an incorporated place when the boundaries of a single precinct contain the entire geographic area of the incorporated place.

(2) No precinct shall be wholly contained within the territorial boundaries of another precinct, except that a precinct which contains the entire geographical area of an incorporated place and in which the total number of registered voters at the last general election was less than two hundred fifty may be so contained.

(3) No precinct shall contain more than two thousand two hundred registered voters within its geographic boundaries. Within thirty days after the completion of each canvass, the registrar of voters of each parish shall notify the parish governing authority of every precinct in the parish which contains more than two thousand two hundred registered voters within its geographic boundaries. Within sixty days of such notification, the parish governing authority shall divide such precincts by a visible feature in accordance with R.S. 18:532.1.

C. Each parish governing authority shall provide and maintain at all times a suitable map showing the current geographical boundaries with designation of precincts and a word description of the precinct geographical boundaries. Each parish governing authority shall send a copy of each map, with description attached, to the registrar of voters, the secretary of state, and the commissioner of elections. The map may be composed of one or more sheets but each sheet shall not exceed three feet by four feet. The map shall include all existing roads, streets, railroad tracks, and drainage features but shall not include underground utility lines, land use and zoning symbols or shadings, symbols for vegetation cover, topographic contour lines, and similar items that obscure the basic street pattern and names. All features, names, titles, and symbols on the map shall be clearly shown and legible. The map sheet of the entire parish shall be on a scale of one inch equals one mile to one inch equals two miles. Map sheets of each incorporated place within the parish shall be on a scale of one inch equals eight hundred feet to one inch equals sixteen hundred feet. Each map sheet shall indicate the date of the base map or the date of last revision. Wherever the boundaries of a precinct or incorporated place are coterminous, they shall be clearly indicated as such.

D. The parish governing authority shall also furnish, a map clearly indicating the boundaries of each parish governing authority district, school board district, special election district, representative district, and senate district.

E. (1) In complying with the provisions of this Section for the establishment of precincts and the prescription of their boundaries, each parish governing authority and registrar of voters shall coordinate with the secretary of the Senate and the clerk of the House of Representatives, or their designees, pursuant to their authority to submit a plan for census data for reapportionment under the provisions of Chapter 13 of Title 18 of the Louisiana Revised Statutes of 1950, and shall adopt or adjust precinct boundaries as may be necessary to comply with this Section.

(2) Each parish governing authority shall by ordinance adopt a proposal for the establishment or adjustment of precinct boundaries, in compliance with this Section, no later than June 15, 1986, provided that any establishment of a precinct or adjustment of a precinct boundary to comply with this Section shall be effective for the following purposes at the following times:

(a) Not later than January 1, 1990, for the purpose of establishing block boundaries for the 1990 federal decennial census.

(b) Not later than forty-five days prior to the opening date for qualifying as a candidate for any election held at the 1991 gubernatorial primary election, for all purposes. Within fifteen days after the adoption of the ordinance, the parish governing authority shall send to the secretary and the clerk a certified copy of the ordinance and a copy of a map showing the new boundaries together with a written description of such boundaries.

(3) If any parish governing authority fails to comply with the provisions of this Section by June 15, 1986, the secretary of the Senate and the clerk of the House of Representatives, or their designees, shall immediately notify the attorney general of such noncompliance. The attorney general shall, upon receipt of such notice, in accordance with R.S. 18:537 institute an action against said governing authority to compel compliance with this Section.

(4) Notwithstanding the provisions of R.S. 18:532.1(A) and (B) or any other law to the contrary, the proposed precinct boundaries submitted to the United States Bureau of the Census by a parish through the secretary of the Senate and the clerk of the House of Representatives or their designees, and approved by the Bureau of the Census as block boundaries for the 1990 Census, shall be the precinct boundaries of any parish in which the parish governing authority has failed to adopt by ordinance on or before December 31, 1988 a proposal for the establishment or adjustment of precinct boundaries as required by this Section. The precinct boundaries established pursuant to the provisions of this Paragraph shall be effective as provided in R.S. 18:532(E)(2).

Amended by Acts 1982, No. 559, § 1, eff. July 22, 1982; Acts 1985, No. 670, § 1, eff. July 16, 1985; Acts 1986, No. 286, § 1, eff. June 30, 1986; Acts 1988, No. 329, § 1; Acts 1988, No. 403, § 1, eff. July 10, 1988; Acts 1990, No. 629, § 1; Acts 1992, No. 788, § 1, eff. Jan. 1, 1993; Acts 1992, No. 803, § 1.

* * * *

§ 532.1 Changing precinct boundaries

A. The parish governing authority shall have author-

ity, in accordance with this Section, to change the configuration, boundaries, or designation of an election precinct. Any change so determined shall be adopted by ordinance of the parish governing authority. Within fifteen days after adoption of the ordinance, the parish governing authority shall send to the secretary of state a certified copy of the ordinance and a copy of the map showing the new precinct boundaries and designations together with a written description of such boundaries. The parish governing authority shall comply with the provisions of R.S. 18:1941 when changing precinct boundaries.

B. After June 15, 1986, a parish governing authority shall only change a precinct by dividing the precinct into two or more precincts except:

(1) Repealed by Acts 1990, No. 629, § 2.

(2) When in order to make it more convenient for voters to vote, or to facilitate the administration of the election process, or to accomplish reapportionment, it becomes necessary to consolidate all or part of a precinct with adjacent precincts, a part or parts may be consolidated but only when the parts that are joined are in the same voting district.

(3) Any establishment, division, or consolidation of precincts as provided in Paragraphs (1) and (2) herein shall be considered a change in precinct boundaries and shall be subject to the requirements of this Section.

C. (1) The parish governing authority shall comply with the provisions of R.S. 18:532(A), (B), and (C) when changing any precinct boundary. Prior to January 1, 1993, any precinct boundary resulting from an establishment of a precinct or precincts or change in precinct boundary shall coincide with a visible feature which is a tabulation boundary depicted on United States Bureau

of the Census maps prepared for the 1990 federal decennial census. After December 31, 1992, any precinct boundary resulting from an establishment of a precinct or precincts or change in precinct boundary shall coincide with a visible feature depicted on a base map that will be used by the United States Bureau of the Census to determine visible tabulation boundaries for the federal decennial census.

(2)(a) In determining features to be used as precinct boundaries, the parish governing authority shall consult with the secretary of the Senate and the clerk of the House of Representatives or their designees. The parish governing authority shall submit proposed changes in precinct boundaries to the secretary and the clerk or their designees on United States Bureau of the Census maps prepared for the 1990 federal decennial census and, where practicable, by electronic medium. No change in a precinct boundary may be made by the parish governing authority without prior review and approval by the secretary and the clerk or their designees, except as provided in this Subparagraph. Such review shall consist of a determination whether the proposed precinct change coincides with a visible feature depicted on a base map that will be used by the United States Bureau of the Census to determine visible tabulation boundaries for the federal decennial census.

(b) The secretary of the Senate and the clerk of the House of Representatives or their designees shall send a report of the findings resulting from the review to the parish governing authority within forty-five days after the receipt of the proposed precinct changes. If the secretary of the Senate and the clerk of the House of Representatives or their designees fail to respond within forty-five days after the receipt of the proposed

precinct changes, the proposed visible feature for precinct boundaries shall be deemed to be approved by the secretary of the Senate and the clerk of the House of Representatives or their designees.

(3)(a) In addition to the requirements of Paragraph (2) of this Subsection, when the proposed precinct change involves a consolidation authorized by Paragraph B(2) of this Section, prior to adoption by ordinance, the parish governing authority shall submit proposed changes of the consolidation to the commissioner of elections. No change in a precinct consolidation may be made by the parish governing authority without prior review and approval by the commissioner of elections, except as provided in this Subparagraph. Such review shall consist of a determination whether the proposed consolidation of the precincts establishes a precinct or precincts where all parts of each proposed new precinct are in the same voting district.

(b) The commissioner of elections shall send a report of the findings resulting from the review to the parish governing authority within forty-five days after the receipt of the proposed precinct changes. If the commissioner of elections fails to respond within forty-five days after the receipt of the proposed precinct consolidations, the proposed consolidations shall be deemed to be approved by the commissioner of elections. No precinct shall be consolidated until all local governing authorities and the parish or city school board within the area affected by the consolidation have completed redistricting and been precleared by the United States Department of Justice.

D. In accordance with R.S. 18:1903, on and after January 1, 1989, no election precinct shall be created, divided, abolished, or consolidated, or the boundaries thereof otherwise changed between January first of any

year which last digit is nine and December thirty-first of any year which last digit is zero, unless ordered by a court of competent jurisdiction.

E. (1) A precinct shall not be changed, and no precinct shall be established or altered in any way as a result of annexation, alphabetical division by voter surname, or otherwise during the period commencing on the date the qualifying period opens and ending on the date of the general election.

(2) For an election which is exclusively for bonds, taxes, and other propositions or questions and for no other kind of election, a precinct shall not be changed during the period commencing on the forty-sixth day prior to the election and ending on the date of the election.

(3) No precinct change that is made prior to the date the qualifying period opens or, in the case of an election exclusively for bonds, taxes, and other propositions or questions, prior to the forty-sixth day before the election shall become effective for those elections, respectively, unless the information required in Subsection A herein, including a statement of no objection to the change from the United States attorney general, is received by the secretary of state prior to the date the qualifying period opens or prior to the forty-sixth day before the election, as the case may be.

F. Within fifteen days after the adoption of the ordinance as provided in the Section, the parish governing authority shall send to the secretary of the Senate and the clerk of the House of Representatives as well as the secretary of state and commissioner of elections a certified copy of the ordinance and a copy of a map showing the new precinct boundaries together with a written description of such boundaries.

G. Repealed by Acts 1993, No. 418, § 2, eff. Jan. 1, 1994.

H. The provisions of this Subsection shall supercede the provisions of R.S. 18:532.1(A), (B), (D), and R.S. 18:1903, and any other law to the contrary.

(1) The precinct boundaries submitted to the United States Bureau of the Census by a parish through the secretary of the Senate and the clerk of the House of Representatives or their designees, and approved by the Bureau of the Census as block boundaries for the 1990 Census, shall not be divided, abolished, consolidated, or the boundaries otherwise changed until after December 31, 1992, unless ordered by a court of competent jurisdiction.

(2) Notwithstanding the provision contained in R.S. 18:532.1(H)(1), if a parish is unable to meet applicable state and federal guidelines in the creation of its reapportionment plan, such parish may divide a precinct into two or more precincts by a visible feature which is a census tabulation boundary during the time period of April 1, 1991 through May 15, 1991.

(a) Such parish shall include such precinct changes in its ordinance defining such reapportionment plan.

(b) A certified copy of the ordinance including any such precinct changes and reapportionment plan must be sent to the secretary of state, the secretary of the Senate, the clerk of the House of Representatives, and the registrar of voters of the parish within fifteen days after the adoption of the ordinance.

(c) In the event that the Department of Justice objects to a parish reapportionment plan, such parish may divide a precinct into two or more precincts by a visible feature which is a census tabulation boundary in

order to satisfy said objections of the Department of Justice.

(d) Such precincts shall not be divided, abolished, or consolidated or the boundaries otherwise changed during the time period of September 1, 1991 through December 31, 1992.

Added by Acts 1982, No. 559, § 1, eff. July 22, 1982. Amended by Acts 1985, No. 670, § 1, eff. July 16, 1985; Acts 1986, No. 286, § 1, eff. June 30, 1986; Acts 1987, No. 831, § 1, eff. Jan. 1, 1988; Acts 1988, No. 329, § 1; Acts 1988, No. 909, § 1; Acts 1990, No. 288, § 1, eff. July 5, 1990; Acts 1990, No. 629, § 1; Acts 1992, No. 803, § 1; Acts 1993, No. 418, § 1, eff. Jan. 1, 1994.

WEST'S LOUISIANA STATUTES ANNOTATED
LOUISIANA REVISED STATUTES (1995)

TITLE 18. LOUISIANA ELECTION CODE

CHAPTER 8-A. ELECTION EXPENSES

§ 1400.1 Election costs paid by secretary of state; governing authorities; reimbursement

A. The cost of ballots and election materials used in gubernatorial and congressional elections, whether or not a gubernatorial or congressional candidate appears on the ballot, shall be paid by the state from funds appropriated to the secretary of state for that purpose, except that when a local or municipal candidate or a local bond, debt, tax, proposition, or question also appears on the ballot, the state shall be required to pay one-half of the cost of ballots and election materials. The remaining one-half shall be pro-rated between the state and all local or municipal entities participating in such election. The pro-rata share of a local or municipal entity shall be determined by dividing the number of that entity's offices, propositions, or questions on the ballot by the total number of all offices, propositions, or questions on the ballot within that local jurisdiction.

B. (1) The cost of ballots and election materials used in any special election when any of the following appear on the ballot shall be paid by the state from funds appropriated to the secretary of state for that purpose:

(a) A state candidate, as defined in R.S. 18:452(1).

(b) A candidate for the state legislature.

(c) A candidate for judge of a judicial district court or juvenile court or a candidate for judge of the criminal district or civil district court for Orleans Parish.

(d) A candidate for the office of district attorney.

(e) A proposed constitutional amendment.

(2) Notwithstanding the provisions of Paragraph (1), when a local or municipal candidate or a local bond, debt, tax, proposition, or question also appears on the ballot, the state shall be required to pay one-half of the cost of ballots and election materials. The remaining one-half shall be pro-rated between the state and all local or municipal entities participating in such election. The pro-rata share of a local or municipal entity shall be determined by dividing the number of that entity's offices, propositions, or questions on the ballot by the total number of all offices, propositions, or questions on the ballot within that local jurisdiction.

C. (1) The cost of ballots and election materials used in any election not provided for in Subsections A and B of this Section shall be paid by the appropriate governing authority that relates to the character of the office or the issue involved in such election.

(2) In any special election called only by a local governing authority or only by a parish or city school board solely for the purpose of voting on a proposition under Chapter 6–A of this Title, a fee of five dollars per certificate and two dollars per page shall be paid to the secretary of state for recording the process verbal as required by R.S. 18:1293.

(3) To administratively facilitate the payment of costs as provided in this Subsection, the secretary of state may initially pay such costs; however, the appropriate governing authority shall reimburse all such costs to the secretary of state, and all monies so received by the secretary of state shall be remitted to the state treasurer. If more than one governing authority is involved in an

election, the secretary of state shall prorate the reimbursable costs among the governing authorities as equitably as possible.

Added by Acts 1983, No. 681, § 1, eff. July 21, 1983. Amended by Acts 1986, No. 783, § 1, eff. July 10, 1986; Acts 1990, No, 107, § 1, eff. Jan. 1, 1991; Acts 1992, No. 963, § 1.

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§ 1400.2. Election costs paid by commissioner of elections; governing authorities; reimbursement

A. The costs of publication of the location of polling places; of renting polling places; of drayage; of setting up voting machines; of compensating commissioners and deputy parish custodians; and of transmitting election returns for gubernatorial and congressional elections, whether or not a gubernatorial or congressional candidate appears on the ballot, shall be paid by the state from funds appropriated to the commissioner of elections for that purpose except that when a local or municipal candidate or a local bond, debt, tax, proposition, or question also appears on the ballot, the state shall be required to pay one-half of such costs. The remaining one-half shall be pro-rated between the state and all local or municipal entities participating in such election. The pro-rata share of a local or municipal entity shall be determined by dividing the number of that entity's offices, propositions, or questions on the ballot by the total number of all offices, propositions, or questions on the ballot within that local jurisdiction.

B. (1) The cost of publication of the location of polling places; of renting polling places; of drayage; of setting up voting machines; of compensating commissioners and

deputy parish custodians; and of transmitting election returns for any special election when any of the following appear on the ballot shall be paid by the state from funds appropriated to the commissioner of elections for that purpose:

(a) A state candidate as defined in R.S. 18:452(1).

(b) A candidate for the state legislature.

(c) A candidate for judge of a judicial district court or juvenile court or a candidate for judge of the criminal district or civil district court for Orleans Parish.

(d) A candidate for the office of district attorney.

(e) A proposed constitutional amendment.

(2) Notwithstanding the provisions of Paragraph (1), when a local or municipal candidate or a local bond, debt, tax, proposition, or question also appears on the ballot, the state shall be required to pay one-half of such costs. The remaining one-half shall be pro-rated between the state and all local or municipal entities participating in such election. The pro-rata share of a local or municipal entity shall be determined by dividing the number of that entity's offices, propositions, or questions on the ballot by the total number of all offices, propositions, or questions on the ballot within that local jurisdiction.

C. (1) The cost of publication of the location of polling places; of renting polling places; of drayage; of setting up voting machines, which cost shall be ten dollars per machine; of compensating commissioners and deputy parish custodians; and of transmitting election returns for any election not provided for in Subsections A and B of this Section shall be paid by the appropriate governing authority that relates to the character of office or issue involved in such election. Except as provided in

Paragraph (2) of this Subsection, if more than one governing authority is involved in an election, a statement of such expenses shall be transmitted to each governing authority involved in the election and payment thereof shall be prorated among the governing authorities as equitably as possible.

(2) To administratively facilitate the payment of costs with respect to elections as provided in this Subsection, the commissioner of elections may initially pay such costs; however, the appropriate governing authority shall reimburse all such costs to the commissioner of elections, who shall remit all such funds to the state treasurer. If more than one governing authority is involved in an election, the commissioner of elections shall prorate its reimbursable costs among the governing authorities as equitably as possible.

Added by Acts 1983, No. 681, §1, eff. July 21, 1983. Amended by Acts 1986, No. 426, § 1; Acts 1986, No. 783, § 1, eff. July 10, 1986; Acts 1988, No. 909, § 1, eff. Jan. 1, 1989; Acts 1990, No. 107, § 1, eff. Jan. 1, 1991; Acts 1992, No. 963, §1.

* * * *

§ 1400.3 Election expenses incurred by clerks of court and registrars of voters; payment by commissioner of elections; payment by governing authorities

A. Election expenses incurred by clerks of court and registrars of voters for gubernatorial and congressional elections, whether or not a gubernatorial or congressional candidate appears on the ballot, shall be paid by the state from funds appropriated to the commissioner of elections for that purpose, except that when a local or municipal candidate or a local bond, debt, tax, proposition, or question also appears on the ballot, the state

shall be required to pay one-half of such costs. The remaining one-half shall be pro-rated between the state and all local or municipal entities participating in such election. The pro-rata share of a local or municipal entity shall be determined by dividing the number of that entity's offices, propositions, or questions on the ballot by the total number of all offices, propositions, or questions on the ballot within that local jurisdiction.

B. (1) Election expenses incurred by clerks of court and registrars of voters for any special election when any of the following appear on the ballot shall be paid by the state from funds appropriated to the commissioner of elections for that purpose:

(a) A state candidate, as defined in R.S. 18:452(1).

(b) A candidate for the state legislature.

(c) A candidate for judge of a judicial district court or juvenile court or a candidate for judge of the criminal district or civil district court for Orleans Parish.

(d) A candidate for the office of district attorney.

(e) A proposed constitutional amendment.

(2) Notwithstanding the provisions of Paragraph (1), when a local or municipal candidate or a local bond, debt, tax, proposition, or question also appears on the ballot, the state shall be required to pay one-half of such costs. The remaining one-half shall be pro-rated between the state and all local or municipal entities participating in such election. The pro-rata share of a local or municipal entity shall be determined by dividing the number of that entity's offices, propositions, or questions on the ballot by the total number of all offices, propositions, or questions on the ballot within that local jurisdiction.

(C) (1) Election expenses incurred by clerks of court and registrars of voters for any election not provided for in Subsections A and B of this Section shall be paid by the appropriate governing authority that relates to the character of office or issue involved in such election. Except as provided in Paragraph (2) of this Subsection, if more than one governing authority is involved in an election, a statement of such expenses shall be transmitted to each governing authority and payment thereof shall be prorated among the governing authorities as equitably as possible.

(2) To administratively facilitate the payment of costs with respect to elections as provided in this Subsection, the commissioner of elections may initially pay such costs; however, the appropriate governing authority shall reimburse all such costs to the commissioner of elections, who shall remit all such funds to the state treasurer. If more than one governing authority is involved in an election, the commissioner of elections shall prorate its reimbursable costs among the governing authorities as equitably as possible.

D. For the purposes of this Section, "election expenses incurred by registrars of voters" is defined and limited to the following:

(1) Expenses incurred by a registrar of voters to pay for one or more temporary part-time clerical employees to perform election duties and responsibilities associated with his office as provided in this Title. Such employees shall be paid at an hourly rate established by the registrar at not to exceed that of a Voter Registration Specialist in the General Schedule at the entry level as specified in the classification and pay plan of the Louisiana Department of Civil Service.

(2) Expenses incurred by a registrar of voters to pay a permanent employee below the level of chief deputy and confidential assistant to perform election duties and responsibilities associated with his office during other than normal hours of operation of his office.

(3) Expenses of an extraordinary nature incurred by a registrar of voters for an election which have received prior approval of the commissioner of elections.

E. For the purpose of this Section, "election expenses incurred by clerks of court" is defined and limited to the following:

(1) Actual expenses incurred by a clerk of court to publish notices required by law in the official journal of the parish and, to insure maximum coverage, in any other journal of the parish or political subdivision thereof. Information contained in such notices shall be limited to that required by law. The commissioner of elections shall prescribe the size of such notices which shall be uniform throughout the state.

(2) Itemized expenses incurred by a clerk of court to conduct the general courses of instruction for commissioners as provided in R.S. 18:431(A) and the course of instruction for commissioners-in-charge as provided in R.S. 18:433(A).

(3)(a) Documented expenses incurred by a clerk of court to perform or fulfill election duties imposed by law. For the purpose of this Paragraph, such expenses shall include the following:

(i) Expenses for postage and office supplies used in connection with an election or used to fulfill an election duty imposed by law.

(ii) Expenses for rental space and instructional paraphernalia to conduct schools of instruction for commissioners and commissioners-in-charge.

(iii) Expenses for personnel used in connection with an election or used to fulfill an election duty imposed by law. Such expenses shall be itemized and reimbursement shall be authorized only for work not performed during regular office hours of the clerk of court.

(iv) Incidental expenses incurred in conducting the general courses of instruction for commissioners and the course of instruction for commissioners-in-charge. Reimbursement for such expenses shall be limited to one hundred dollars per general commissioner school and one hundred dollars for the commissioner-in-charge school. Maximum reimbursement to a clerk of court for conducting such schools shall be limited to three hundred dollars per calendar year and all reimbursements shall be deposited in the general fund of the clerk of court.

(b) The commissioner of elections shall establish rules and regulations governing reimbursement for expenses set forth herein and may establish rules and regulations to add other categories of reimbursable expenses. All reimbursements shall be deposited in the general fund of the clerk.

(4) Expenses of an extraordinary nature incurred by a clerk of court for an election which have received prior approval of the commissioner of elections.

Added by Acts 1983, No. 681, § 1, eff. July 21, 1983. Amended by Acts 1986, No. 669, § 1; Acts 1986, No. 783, § 1, eff. July 10, 1986; Acts 1988, No. 909, § 1, eff. Jan. 1, 1989; Acts 1990, No. 107, § 1, eff. Jan. 1, 1991; Acts 1992, No. 963, § 1.

Supreme Court of the United States

No. 95-1455

JANET RENO, ATTORNEY GENERAL, APPELLANT

v.

BOSSIER PARISH SCHOOL BOARD, ET AL.

[Filed June 3, 1996]

APPEAL from the United States District Court for the District of Columbia.

The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted.

Supreme Court of the United States

No. 95-1508

GEORGE PRICE, ET AL., APPELLANTS

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[Filed June 3, 1996]

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(5) (4)

Nos. 95-1455 and 95-1508

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QUESTIONS PRESENTED

1. Whether a district court assessing a covered jurisdiction's purpose under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, may disregard factors this Court has held are relevant to proof of discriminatory purpose, on the ground that such evidence is also relevant to show vote dilution under Section 2, 42 U.S.C. 1973.

2. Whether the district court clearly erred in finding no discriminatory purpose.

3. Whether a voting change that clearly violates Section 2 of the Voting Rights Act is entitled to preclearance under Section 5 of the Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

Nos. 95-1455 and 95-1508

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BRIEF FOR THE FEDERAL APPELLANT

OPINION BELOW

The opinion of the three-judge district court (J.S. App. 1a-65a) is reported at 907 F. Supp. 434 (D.D.C. 1995).

JURISDICTION

The judgment of the three-judge district court was entered on November 2, 1995. A notice of appeal was filed on December 27, 1995. J.S. App. 163a-164a. The Court noted probable jurisdiction on June 3, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1253 and 42 U.S.C. 1973c.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are Sections 2 and 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973, 1973c. J.S. App. 165a-167a. This case also involves a provision

of the Procedures for the Administration of Section 5, 28 C.F.R. 51.55(b)(2). J.S. App. 168a.

STATEMENT

1. Congress enacted the Voting Rights Act of 1965 to eliminate racial discrimination in voting. Section 5 of the Act, 42 U.S.C. 1973c, provides that a covered jurisdiction may not implement any change affecting voting unless it first obtains judicial or administrative preclearance. A covered jurisdiction may obtain judicial preclearance of a voting change by establishing in a declaratory judgment action in the United States District Court for the District of Columbia that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. 1973c. Alternatively, a covered jurisdiction may submit the voting change to the Attorney General for administrative preclearance. The change may be enforced if, within 60 days after its submission to her, the Attorney General has interposed no objection to it. There is no dispute that the Bossier Parish School Board redistricting plan involved in this case is a change in an election practice by a jurisdiction that is covered by the requirements of Section 5. See J.S. App. 140a-141a (¶¶ 249, 251).

Section 2 of the Act, as amended in 1982, 42 U.S.C. 1973, prohibits any voting practice "which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. 1973(a). A voting practice violates Section 2 if it has the discriminatory effect of denying minority citizens an equal opportunity to participate in the electoral process and to elect representatives of their choice. 42 U.S.C. 1973(b).

2. a. This appeal arises from a declaratory judgment action by the Bossier Parish School Board (Board) for preclearance of a redistricting plan. The 12-member

Board governs the Bossier Parish School District, which is coterminous with the parish. J.S. App. 3a-4a. The Board is elected from single-member districts for four-year, concurrent terms. A majority-vote requirement applies to elections of Board members. *Id.* at 4a. The Board redistricted following the 1990 census in order to eliminate population malapportionment among its districts.

In 1990, black persons comprised 20.1% of the total population of Bossier Parish, and 17.6% of the voting age population. J.S. App. 2a. As of 1994, blacks comprised 15.5% of Bossier Parish's registered voters. *Ibid.* The black population of the parish is concentrated in two areas: More than 50% of the black residents live in Bossier City, *id.* at 68a (¶ 10), and the remaining black population is concentrated in four populated areas in the northern rural portion of the parish, *id.* at 2a, 68a (¶ 10).[1] The parties have stipulated that it is feasible to draw two reasonably compact black-majority districts in Bossier Parish using traditional redistricting features such as roads, streams, railroads, and corporate boundaries: one in Bossier City, *id.* at 76a (¶ 36), and one in the northern rural area of the parish, *id.* at 114a (¶ 148); see *id.* at 113a-115a (¶¶ 143-150).

The parties also have stipulated to facts showing that voting in the parish is racially polarized, J.S. App. 40a, 122a-127a (¶¶ 181-196); see also J.A. 113-121 (Engstrom declaration), and that "voting patterns in Bossier Parish are affected by racial preferences," J.S. App. 122a (¶ 181). At the time the Board voted to adopt the redistricting plan at issue in this case, black candidates had

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[1] The northern rural portion of the parish is sparsely populated in comparison with the rest of the parish, with more densely populated communities separated by large, lightly settled areas. In the School Board redistricting plan at issue in this case, that portion of the parish is encompassed in a single, 33.5-mile-long, 424-square-mile district. The district encompasses almost half of the area of Bossier Parish. J.S. App. 114a-115a (¶ 149); *id.* at 112a (¶ 140).

run for election to the Board on at least four occasions, but none had ever been elected. *Id.* at 4a, 115a (¶ 153); see also J.A. 54-60. Black voters historically have also been unable to elect candidates of their choice to other political positions in Bossier Parish. J.S. App. 118a-172a (¶¶ 153-196). Of the 14 elections in the parish since 1980 in which a black candidate has run against a white candidate in a single-member district or for mayor, only two black candidates have won. *Id.* at 127a (¶ 196); see also J.A. 54-60. One was a candidate for the Bossier Parish Police Jury,[2] and the other for the Bossier City Council. *Ibid.* The black Police Juror won in Police Jury District 10, which contained a United States Air Force base, J.S. App. 117a (¶¶ 160-161), and the black City Council member won in a city council district that substantially overlapped with Police Jury District 10, and also included the Air Force base, *id.* at 120a (¶ 172). The district court found that the Base is a factor unique to those districts that increased the ability of black voters in that area to elect representatives of their choice. *Id.* at 2a n.1.[3]

Bossier Parish and its School Board have a history of racial discrimination beginning before the Civil War and continuing to the present. See generally J.S. App. 42a-

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[2] The Police Jury is the governing body for the parish. See pages 6-7, *infra*.

[3] Many residents in and around the base do not vote in local elections, J.S. App. 117a-118a (¶¶ 160-163); that factor, together with the tendency of Air Force retirees who settle in the area to vote in a less racially polarized way than other Bossier Parish residents, increases the ability of black voters in the districts containing the Air Force base to elect representatives of their choice. *Id.* at 117a-118a (¶¶ 162-163), 127a (¶ 196). In the reconfigured plans adopted by the Police Jury in 1991 and the City Council in 1993, the Air Force base no longer has that effect. *Id.* at 2a n.1. The black incumbent Police Juror was reelected in 1991 in the redrawn district in an election in which he ran unopposed. *Ibid.* The black City Council member ran against a white opponent in 1993 and lost. *Id.* at 120a (¶ 173).

46a, 130a-140a (¶¶ 214-248).[4] De jure segregation prevailed in Louisiana's schools long after this Court decided *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954). J.S. App. 136a (¶ 235). The Board has repeatedly sought to evade its desegregation obligations. *Id.* at 136a-137a (¶¶ 237-239). It remains under court order to remedy the vestiges of racial discrimination in its school system. See *Lemon* v. *Bossier Parish School Bd.*, 240 F. Supp. 709 (W.D. La. 1965), aff'd, 370 F.2d 847 (5th Cir.), cert. denied, 388 U.S. 911 (1967). Notwithstanding the Board's affirmative obligation to desegregate, the schools in Bossier Parish have, since 1980, become increasingly segregated by race. J.S. App. 137a-138a (¶¶ 240-242). Although black students comprise only 29% of the Parish's student population, four of the 27 schools in the Parish have student bodies that are more than 70% black. *Id.* at 138a (¶ 242).[5]

In addition to presiding over increasing racial segregation in parish school populations, the Board has violated the *Lemon* court's order by failing to maintain a biracial

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[4] Many decades of discriminatory government action in Louisiana resulted in the large-scale disenfranchisement of black voters. Following the passage of the Thirteenth Amendment, Louisiana enacted laws intended to reduce black voting; black registration decreased by 90% within a few years. J.S. App. 130a-131a (¶¶ 215-219). In 1921, an amendment to the state Constitution required persons seeking to register to vote to "give a reasonable interpretation" of a constitutional provision. *Id.* at 132a (¶ 221). That clause, which disenfranchised most black citizens, was not invalidated until 1965. *Louisiana* v. *United States*, 380 U.S. 145 (1965). After an all-white Louisiana Democratic primary was invalidated, the party adopted other discriminatory election devices, including an anti-single-shot law and a majority-vote requirement for party office. J.S. App. 132a (¶ 222); *Major* v. *Treen*, 574 F. Supp. 325, 341 (E.D. La. 1983).

[5] Each of those four predominantly black schools is located within one of the two areas, Bossier City and the northern rural portion of the parish, J.S. App. 12a (¶ 142), in which a reasonably compact majority-black district may be drawn, *id.* at 76a (¶ 36); *id.* at 114a-115a (¶¶ 148-150).

committee to recommend ways to attain and maintain a unitary school system. J.S. App. 103a-104a (¶¶ 111-112). The Board first convened the committee in 1976, but only the black committee members attended the few meetings that were held, and the Board promptly disbanded the committee. *Ibid.* The Board did not convene another biracial committee until 1993, shortly after submitting its redistricting plan to the Justice Department for Section 5 review. *Id.* at 104a (¶ 113). The Board promptly disbanded that committee because, as School Board President Barry Musgrove explained, "the minority members of the committee quickly turned toward becoming involved in policy." *Id.* at 105a (¶ 116).

The effects of past discrimination in Bossier Parish continue today: "Black citizens of Bossier Parish suffer a markedly lower socioeconomic status than their white counterparts" that is "traceable to a legacy of racial discrimination affecting Bossier Parish's black citizens." J.S. App. 128a (¶ 200); see generally *id.* at 127a-130a (¶¶ 197-213). That status "makes it harder for blacks to obtain necessary electoral information, organize, raise funds, campaign, register, and turn out to vote, and this in turn causes a depressed level of political participation for black persons within Bossier Parish." *Id.* at 130a (¶ 213). Significantly smaller proportions of black voting-age citizens than white voting-age citizens have in fact registered to vote in Bossier Parish. *Id.* at 127a (¶ 197).

b. Following the 1990 census, redistricting efforts by the Bossier Parish Police Jury preceded the School Board redistricting. The Police Jury, like the School Board, consists of 12 members who are elected from single-member districts in the same manner as the Board. J.S. App. 2a. The Police Jury has never had a districting plan that contained any majority-black districts. *Ibid.*

During the 1990-1991 redistricting process, the white Police Jurors and their demographer knew that it was feasible to effectuate black political participation by adopt-

ing a non-dilutive redistricting plan. J.S. App. 76a (¶ 36), 82a-83a (¶ 53), 114 (¶ 148). Police Jurors nonetheless told citizens who advocated creating majority-black districts that it was impossible to create such districts because the black population was too dispersed. *Id.* at 3a, 83a (¶ 54); see also *id.* at 82a (¶ 52). In April, 1991, the Police Jury adopted a redistricting plan that, like all of its predecessors, contains no majority-black districts. *Id.* at 3a, 68a (¶ 11).

On May 28, 1991, the Police Jury submitted its redistricting plan to the Attorney General seeking preclearance under Section 5. The Police Jury did not provide the Attorney General with information then available to it showing that reasonably compact majority-black districts could be created. J.S. App. 68a-69a (¶ 11), 76a (¶ 36), 82a-83a (¶ 53). Nor did it provide a copy of a letter from the Concerned Citizens of Bossier Parish, a local organization, protesting the Police Jury's exclusion of black citizens from the redistricting process, *id.* at 69a (¶ 11), despite the organization's express request that the letter be included in the Police Jury's Section 5 submission, *id.* at 87a (¶¶ 65, 66). On July 29, based on what turned out to be inaccurate and incomplete information, the Attorney General precleared the Police Jury redistricting plan. *Id.* at 3a, 68a-69a (¶ 11).

c. The School Board began its own redistricting process in early 1991. J.S. App. 4a. With its next election not scheduled to occur until October, 1994, the Board proceeded without urgency. *Id.* at 4a, 93a (¶ 83). The Board initially chose not to use the districts in the 1991 Police Jury plan, but to develop a different plan. *Id.* at 4a, 28a, 47a, 94a (¶ 87). Although the Board and the Police Jury have jurisdiction over the same geographic area and both use 12 single-member districts, the bodies serve different functions and for at least a decade have maintained different electoral districts. *Id.* at 3a-4a & n.3, 72a-73a (¶¶ 24, 26); U.S. Exh. 94, at 14. School boards and police juries have different redistricting inter-

ests that generally warrant different plans: "For example, police juries are concerned with road maintenance, drainage, and in some cases garbage collection, and the level of demand for such services in each district is a concern. School board members, by contrast, are typically concerned with having a public school or schools in each district." J.S. App. 73a (¶ 24); U.S. Exh. 94, at 14-15. Police Jury district lines do not correspond with school attendance zones, and schools are unevenly distributed in the Police Jury districts, with some districts containing no schools and others containing several. J.S. App. 8a, 112a (¶ 141). If used by the Board, the 1991 Police Jury plan would, in addition, pit two sets of Board incumbents against one another and create other districts with no Board incumbents. *Id.* at 8a, 102a (¶ 109).

The Board hired Gary Joiner, the Police Jury's cartographer, to develop a redistricting plan for the Board, estimating that he would spend 200 to 250 hours on the project. J.S. App. 92a (¶ 80), 94a (¶ 86). The cartographer met privately with Board members and showed them various computer-generated alternative districts. *Id.* at 97a (¶ 96).

Beginning in March, 1992, representatives of local black community groups (including defendant-intervenor George Price, president of the local chapter of the NAACP) requested that representatives of the black community be included in the Board's redistricting process. The Board did not respond to those requests. J.S. App. 5a, 96a-98a (¶¶ 93-94, 97). In August, 1992, with no other plan publicly on the table, Price presented a plan for two majority-black districts that had been developed by the NAACP. *Id.* at 6a, 96a-97a (¶ 95), 98a (¶¶ 98-99). Price was told that the Board would not consider a plan that did not also draw the other ten districts. *Id.* at 6a, 98a (¶ 99).

At the September 3, 1992, Board meeting, Price presented an NAACP plan depicting all 12 districts, but the Board refused to consider it, ostensibly because "the

plan's district lines crossed existing precinct lines, and therefore violated state law." J.S. App. 99a (¶ 102); *id.* at 6a.[6] The Board's cartographer and attorney knew at the time, however, that the crossing of existing precinct lines did not legally preclude the Board from considering the plan. *Id.* at 99a-100a (¶ 102). Although state law prohibits school boards from splitting precincts, *id.* at 71a-72a (¶ 21), school boards were always "free to request precinct changes from the Police Jury necessary to accomplish their redistricting plans [*sic*: goals]," *id.* at 7a (quoting *id.* at 72a (¶ 23)). That practice is "quite common" statewide. *Id.* at 72a (¶ 22); J.A. 168 (Joiner testimony); see J.A. 136-138 (Creed testimony); J.A. 140-141 (Creed supplemental testimony).[7] The Bossier Parish School Board itself apparently had anticipated the necessity of splitting precincts in its redistricting plan. See J.S. App. 29a, 56a-57a, 95a (¶ 89). Joiner had given the Board precinct maps at the start of the redistricting process, telling them that they "would have to work with the Police Jury to alter the precinct lines," *id.* at 95a (¶ 89).

At no time during the redistricting process did the Board or its cartographer ever assert that there was any value in avoiding precinct splits or in minimizing their number. Nor, during the redistricting process, did Board members or their cartographer ever discuss the alleged costs of creating precinct splits. See generally U.S. Exhs. 26-28, 32, 34 (Board minutes); J.A. 87-88 (Blunt testimony). The Board never requested that the Police Jury consider realigning the precincts. J.S. App. 7a. The

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[6] Louisiana election precincts are administrative units established for the purpose of conducting elections, including siting polling booths and allocating election officials. See Defendant-Intervenors' Exh. G at 15.

[7] For example, of the nine redistricting plans the Board's cartographer had drawn for Louisiana parishes, five involved school boards that sought and received precinct changes from their police juries in this manner. Tr. vol. I (Apr. 10, 1995), at 157-158 (Joiner testimony).

Board also never asked its cartographer to explore the possibility of modifying the NAACP proposal to reduce the number of precinct splits, or of otherwise developing a plan that would alleviate black vote dilution. *Id.* at 101a (¶ 106).

Instead, at the Board's next scheduled meeting, two weeks after Price presented the NAACP plan and two years before the next Board election, the Board unanimously passed a motion of intent to adopt the Police Jury plan that it had initially found unsatisfactory. J.S. App. 100a (¶ 106). The Board's action to adopt the Police Jury plan precipitated overflow citizen attendance at a Board meeting on September 24, 1992. *Id.* at 7a-8a, 101a (¶ 108). Fifteen residents voiced their opposition to adoption of the Police Jury plan, principally on the ground that it would dilute black voting strength. *Ibid.* No one spoke in favor of the Police Jury plan. *Id.* at 8a. The NAACP presented a petition containing over 500 signatures—the largest number of signatures on a petition opposing a Board action that had been submitted on any subject in years. *Id.* at 101a (¶ 108). The petition asked the Board to consider alternatives to the Police Jury plan that would be less dilutive of minority voting strength. *Id.* at 7a-8a.

George Price, on behalf of several community organizations representing interests of black residents, urged the Board to consider the NAACP plan or to use it as a foundation for creating a different non-dilutive plan. J.S. App. 6a-8a; 101a (¶ 108). Price also explained to the Board that, in light of the NAACP plan, which demonstrated the feasibility of drawing one or more reasonably compact majority-black districts, the Attorney General's preclearance of the Police Jury plan did not guarantee preclearance of the same plan for School Board elections. J.A. 122, 132. The Board did not respond to the opponents of the Police Jury plan, and adopted that plan at its next meeting. J.S. App. 8a, 102a (¶ 109).

Several board members explained, in private conversations, why the Board had refused to consider any less dilutive redistricting plan. Board member Henry Burns stated that although he personally favors "having black representation on the board, other school board members oppose that idea." J.A. 93 (Davis testimony); J.S. App. 31a, 53a-54a. Board member Barry Musgrove said that "the Board was 'hostile' toward the idea of a black majority district." J.A. 123 (Price testimony); J.S. App. 53a. Board member Thomas Myrick explained to Price his own opposition to a less dilutive redistricting plan. Myrick represented a district that included portions of predominantly black communities, which, if not divided, could comprise part of a black-majority district north of Bossier City. J.S. App. 81a (¶ 48), 93a-94a (¶ 85); see also J.A. 102-103 (Castille declaration); J.S. App. 110a-111a (¶¶ 133-138).[8] Myrick told Price that "he had worked too hard to get [his] seat and that he would not stand by and 'let [them] take his seat away from him.'" J.A. 124 (Price testimony); see J.A. 135 (Harry testimony); J.S. App. 53a. Myrick also told Joiner, the Board's own cartographer, that he wanted to avoid creating a black-majority district. J.A. 163-164 (Joiner testimony).

The Board submitted the Police Jury plan to the Attorney General for preclearance. On August 30, 1993, the Attorney General objected to the plan under Section 5 of the Voting Rights Act, citing information available to

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[8] Myrick, accompanied by at least two Police Jurors who represented districts that similarly divided black communities, had met frequently with the Police Jury's cartographer, Gary Joiner, during the Police Jury redistricting process. J.S. App. 81a (¶ 48), 93a-94a (¶ 85). Although Myrick flatly denied at trial having met with Joiner, J.A. 151, 156-157, Joiner testified that Myrick had come to his office several times—as many as six to ten—to discuss the Police Jury redistricting, and to indicate his opposition to drawing a black majority district, J.A. 159-164. It was Myrick who first proposed to the Board that it adopt the Police Jury plan as its own. J.A. 151-152 (Myrick testimony).

the Board, showing the clear discriminatory effect of the plan on minority voting strength, that had not been provided when the Police Jury submitted the same plan in 1991. J.S. App. 8a, 106a (¶ 119), 154a-158a. On December 20, 1993, the Attorney General denied the Board's request for reconsideration and withdrawal of the objection. *Id.* at 159a-162a.

3. On July 8, 1994, the Board filed a declaratory judgment action seeking Section 5 preclearance from a three-judge district court for the District of Columbia. One judge of the panel presided over a two-day trial that was held on April 10 and 11, 1995. The record, consisting primarily of stipulated facts, written direct testimony prepared before trial, and the transcript of live cross and redirect examinations, was provided to the other judges and closing argument was conducted before the entire panel. J.S. App. 9a. On November 2, 1995, the district court granted preclearance. *Id.* at 36a.

The district court first held that Section 5 preclearance cannot be denied based upon a violation of Section 2. J.S. App. 11a-12a. The court reasoned that Section 2 "uses plainly different language and serves a different function from that of section 5." *Id.* at 15a. The court held that the discriminatory effects addressed by Section 5 are limited to retrogressive effects, whereas Section 2's "results" standard "can be violated * * * irrespective of whether the disputed voting practice is better or worse than whatever it is meant to replace." *Ibid.* The court did not address the United States' alternative argument that a Section 2 violation, even if not a form of prohibited "effect" under Section 5, nevertheless constitutes an equitable defense against Section 5 preclearance, on which the United States bears the burden of proof. See U.S. Post-Trial Br. 32 n.27.

The district court concluded that the legislative history of the Act did not support denial of preclearance based on a Section 2 violation. In its view, resort to the legis-

lative history was inappropriate because the language of the statute is "unambiguous." J.S. App. 17a. The court also refused to accord any deference to the Department of Justice regulation requiring the Attorney General to withhold preclearance of voting changes that clearly violate Section 2, 28 C.F.R. 51.55(b)(2), on the ground that a federal court has authority co-equal with that of the Attorney General to interpret Section 5 in the first instance. J.S. App. 18a-19a. In light of its legal ruling, the court declined to decide whether the evidence established that the redistricting plan was dilutive in violation of Section 2. *Id.* at 9a n.6.

The district court then held that the Board had met its burden of showing that, in adopting the Police Jury plan, it did not act with a racially discriminatory purpose. J.S. App. 27a-29a. In deciding that question, the court held that "evidence of a section 2 violation" may not be considered as "evidence of discriminatory purpose under section 5." *Id.* at 23a; see also *id.* at 24a, 9a n.6. The court thus refused to consider, as relevant to the Board's purpose, evidence of the Board's contemporaneous awareness that the Police Jury plan was dilutive and therefore had the discriminatory effect of precluding any meaningful opportunity for black citizens to elect representatives of their choice. *Id.* at 9a n.6. The district court also refused to consider evidence that the Board had a long history of racial discrimination, including continuing noncompliance with a court order in the three-decade-old *Lemon* school desegregation case in which it is a defendant. *Id.* at 34a n.18.

The district court acknowledged that the Board had "offered several reasons for its adoption of the Police Jury plan that clearly were not real reasons." J.S. App. 27a & n.15. It nonetheless found "legitimate, nondiscriminatory motives" for the Board's adoption of the Police Jury plan: "The Police Jury plan offered the twin attractions of guaranteed preclearance and easy implementation (be-

cause no precinct lines would need redrawing)." *Id.* at 27a-28a.

Judge Kessler concurred in part and dissented in part. J.S. App. 37a-65a. She agreed with the majority that a Section 2 violation does not prevent Section 5 preclearance, J.S. App. 37a, but dissented from the majority's conclusion that the Board acted with legitimate, nondiscriminatory motives, *id.* at 38a-65a. Taking into account evidence that this Court held in *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977), is relevant in assessing discriminatory purpose, Judge Kessler would have found that "the evidence demonstrates conclusively that the Bossier School Board acted with discriminatory purpose." J.S. App. 39a.

SUMMARY OF ARGUMENT

1. This Court consistently has held that the discriminatory effect of a voting change on racial minorities, and the history of discrimination by the jurisdiction that adopted the change, are highly relevant in the assessment of whether the jurisdiction acted with a discriminatory purpose. By prohibiting consideration of such probative evidence under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, the district court squarely contravened this Court's established approach to determining discriminatory purpose in both voting and non-voting contexts. Because the application of an erroneously restrictive legal standard necessarily affected its decision, the district court's judgment cannot stand.

When all the relevant evidence is considered, the record permits only one conclusion: that the Board adopted its redistricting plan with a racially discriminatory purpose. In addition to the clearly dilutive impact of the plan—which "effectively excludes minority voters from the political process," J.S. App. 41a—and the Board's history of discrimination, several other indicia make the Board's discriminatory purpose clear. After a long, deliberate search

for a redistricting plan different from that of the Police Jury, the Board suddenly rushed to adopt the Police Jury plan as soon as it became clear that the local African-American community would oppose any efforts to obtain preclearance of a dilutive plan. As a result, the School Board entirely disserved two of its primary traditional districting concerns: incumbency protection and distribution of schools and attendance areas among districts. The decision to adopt the Police Jury plan at the time it was adopted makes sense only if the Board was intent on drawing a plan without *any* majority-black districts and chose the Police Jury plan because it was the only such plan that the Board thought likely to be precleared.

In this context, "guaranteed preclearance" was not, as the district court believed (J.S. App. 28a), a nondiscriminatory motivation; rather, it was a means of effectuating the Board's purposeful discrimination. Although the Board has asserted other allegedly legitimate justifications, those reasons constituted nothing more than post hoc rationalizations. Indeed, the district court found that many of the Board's asserted motivations "clearly were not real reasons" for its actions. *Id.* at 27a n.15. The district court's finding of no discriminatory purpose is clearly erroneous and must therefore be reversed.

2. The district court also erred in holding that voting changes that dilute minority voting strength in violation of Section 2 of the Act are entitled to preclearance under Section 5. Since *Beer* v. *United States*, 425 U.S. 130 (1976), this Court has recognized that an unlawfully dilutive voting change is not entitled to preclearance. When it amended Section 2 and extended Section 5 in 1982, Congress was aware of and endorsed that rule; it therefore expressed its intent that preclearance should be withheld from changes that violate amended Section 2's prohibition on vote dilution. The same principle is embodied in a regulation promulgated by the Attorney General in 1987 and drafted with close legislative oversight. 28 C.F.R.

51.55(b)(2). The district court's ruling that changes which are known to be illegal under Section 2 must nevertheless be precleared creates an anomaly that is plainly contrary to Congress's intent.

ARGUMENT

I. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE BOSSIER PARISH SCHOOL BOARD ADOPTED THE POLICE JURY REDISTRICTING PLAN WITHOUT ANY DISCRIMINATORY PURPOSE

A. The District Court Committed Legal Error by Categorically Refusing to Consider the Dilutive Effect of the Board's Decision and the Board's History of Discrimination

1. Under Section 5, a voting change adopted with a discriminatory purpose may not be precleared. See 42 U.S.C. 1973c; *City of Richmond* v. *United States*, 422 U.S. 358, 378-379 (1975). "[D]etermining the existence of a discriminatory purpose 'demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.' " *Rogers* v. *Lodge*, 458 U.S. 613, 618 (1982) (quoting *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977)). In *Arlington Heights*, this Court set forth a nonexhaustive list of factors relevant to that inquiry. "The impact of the official action—whether it 'bears more heavily on one race than another'—may provide an important starting point." *Arlington Heights*, 429 U.S. at 266 (citation omitted) (quoting *Washington* v. *Davis*, 426 U.S. 229, 242 (1976)). Other relevant factors include the "historical background of the decision"—"particularly if it reveals a series of official actions taken for invidious purposes," 429 U.S. at 267; the "specific sequence of events leading up to the challenged decision," including any procedural or substantive departures from normal practices, *ibid.*; and the "legislative or administrative history"—"especially

where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports," *id.* at 268.

This Court has applied the *Arlington Heights* standards in adjudicating claims of unconstitutional, purposeful vote dilution. See *Rogers*, 458 U.S. at 618-622; *City of Mobile* v. *Bolden*, 446 U.S. 55, 70 (1980) (plurality opinion). The Court has also repeatedly affirmed judgments of three-judge district courts that have applied those standards to Section 5's discriminatory purpose analysis. See *City of Pleasant Grove* v. *United States*, 568 F. Supp. 1455, 1458 (D.D.C. 1985), aff'd, 479 U.S. 462 (1987); *Busbee* v. *Smith*, 549 F. Supp. 494, 516-517 (D.D.C. 1982), aff'd, 459 U.S. 1166 (1983); *City of Port Arthur* v. *United States*, 517 F. Supp. 987, 1019 (D.D.C. 1981), aff'd, 459 U.S. 159 (1982).

The district court did not follow the established *Arlington Heights* approach. Instead, it incorrectly limited the facts it considered probative of discriminatory purpose in a Section 5 proceeding. The court specifically refused to consider either the discriminatory effect of the challenged redistricting plan on minority voters or Bossier Parish's history of racial discrimination. Characterizing that evidence as "section 2 evidence," the district court asserted that it had no bearing on the assessment of purpose in a Section 5 proceeding.[9] The court thus ignored important facts that were highly probative of the Board's purpose in

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[9] J.S. App. 23a ("*Miller*[v. *Johnson*, 115 S. Ct. 2475 (1995)] forecloses the permitting of section 2 evidence in a section 5 case."); *id.* at 24a ("[W]e will not permit section 2 evidence to prove discriminatory purpose under section 5."); *id.* at 34a n.18 (suggesting that the historical failure of the School Board to comply with the terms of the desegregation order entered against it was irrelevant to the inquiry into its purpose in adopting a redistricting plan with no majority-black districts); see also *id.* at 9a n.6 ("Because we hold * * * that section 2 of the Voting Rights Act * * * has no place in this section 5 action, much of the evidence relevant only to the section 2 inquiry is not discussed in this opinion.").

adopting the redistricting plan for which it sought preclearance.

a. The district court erred in refusing to consider evidence of the dilutive effect of the Board's redistricting plan on minority voting strength. "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the [challenged decision] bears more heavily on one race than another." *Washington* v. *Davis*, 426 U.S. at 242. In the voting rights context, evidence of the discriminatory impact of a decision is often "an important starting point" for an inquiry into purpose. *Bolden*, 446 U.S. at 70; see *Rogers*, 458 U.S. at 623-624. So, too, in discrimination cases arising in other contexts, this Court has held that the impact of a challenged practice is an important element in the assessment of purpose. See, *e.g.*, *Pullman-Standard* v. *Swint*, 456 U.S. 273, 289 & n.18 (1982) (Title VII); *Columbus Bd. of Educ.* v. *Penick*, 443 U.S. 449, 464 (1979) (education); *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 274-275 (1979) (employment); *Arlington Heights*, 429 U.S. at 266 (zoning). "Impact" evidence is probative because, when the adverse consequences of a challenged action upon an identifiable group are inevitable or foreseeable, "a strong inference that the adverse effects were desired can reasonably be drawn." *Feeney*, 442 U.S. at 279 n.25.

The School Board was well aware of the dilutive effect of the Police Jury plan upon minority voting strength, and the Board's adoption of that plan with knowledge of that effect is strongly probative of the Board's discriminatory purpose. As Judge Kessler noted below, the Police Jury plan "effectively excludes minority voters from the political process." J.S. App. 41a. Ample evidence established that the Board was aware of that dilutive impact. "There was * * * overwhelming evidence of bloc voting along racial lines" and, "although there had been black candidates, no black had ever been elected" to the Bossier

Parish School Board. *Rogers*, 458 U.S. at 623; J.S. App. 40a, 115a-127a (¶¶ 153-196).[10] The Board admitted that it was "obvious that a reasonably compact black-majority district could be drawn within Bossier City," *id.* at 76a (¶ 36), and that the NAACP plan Price presented to the Board demonstrated that a second, reasonably compact majority-black district could be drawn using natural and artificial boundaries traditionally used in redistricting. *Id.* at 113a-115a (¶¶ 143-150). Price and many other citizens told the Board that the proposed redistricting plan would unnecessarily diminish black voting strength. *Id.* at 101a-102a (¶ 108).

"[R]ather than consider either of the alternative proposals [that included compact majority-black districts] brought before it or direct their own cartographer to draft one," however, "the School Board adopted a plan 'which guaranteed that blacks would remain underrepresented on the [Board] by comparison to their numerical strength.'" J.S. App. 41a (quoting *City of Port Arthur*, 517 F. Supp. at 1022). Such "actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose." *Penick*, 443 U.S. at 464. The district court erred in refusing to consider, as relevant to the Board's purpose, this substantial, largely stipulated evidence demonstrating minority vote dilution. See *Rogers*, 458 U.S. at 623-627.

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[10] Board members knew that no black candidate had ever been elected to the Board, J.A. 125, 126 (letters from Price to School Board); U.S. Exh. 98, at 28-30 (Board member Hensley testimony regarding Board receipt of Price letter), and the presence of racial bloc voting in Bossier Parish was generally recognized among the community and elected officials, see, *e.g.*, U.S. Exh. 102, at 8-9 (Board member Blunt testimony); J.S. App. 122a (¶ 181) (Police Juror Burford's understanding that there was substantial racial bloc voting); U.S. Exh. 31 (recognition in local press); U.S. Exh. 104, at 4, 8 (former Bossier City Councilman Jeff Darby testimony); U.S. Exh. 105, at 11-13 (police juror Jerome Darby testimony).

b. The district court also failed to take into account other relevant evidence of purpose solely because it would also be relevant in a Section 2 proceeding. This Court has held that "[e]vidence of historical discrimination is relevant to drawing an inference of purposeful discrimination." *Rogers*, 458 U.S. at 625; accord *Arlington Heights*, 429 U.S. at 267. The district court, however, refused to consider the Board's substantial and continuing legacy of discrimination against blacks in its administration of the Bossier Parish school system. J.S. App. 9a n.6, 34a n.18, 42a n.4; compare *id.* at 34a n.18 with *id.* at 42a-46a, 136a-138a (¶¶ 236-243).

The Bossier Parish School Board has presided over increasingly segregated schools in spite of its affirmative, continuing duty to eliminate racial segregation; that fact buttresses our contention that the same Board acted with a discriminatory purpose when it adopted a redistricting plan that adversely dilutes black voting strength. *Rogers*, 458 U.S. at 624-625 (referring to lingering school segregation as relevant to proof of purposeful discrimination). Indeed, the Board recently violated a court desegregation order by disbanding a biracial committee; it did so because "the tone of the committee made up of the minority members * * * quickly turned toward becoming involved in policy." J.S. App. 105a (¶ 116).[11] That action is probative of the Board's unresponsiveness to reasonable concerns of the black community—another "important element * * * of [the] number of circumstances a court should consider in determining whether discriminatory purpose may be inferred." *Rogers*, 458 U.S. at 625 & n.9. The district court erred as a matter of law by refusing to take into account that highly probative evidence of the Board's continuing racial discrimination.

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[11] As Judge Kessler noted, "[w]hat exactly the Committee was supposed to become involved in, if not policy, is unclear." J.S. App. 46a.

2. The district court gave three reasons for categorically excluding from consideration any evidence that would be relevant in a Section 2 case. None is persuasive.

First, the court suggested that allowing such evidence in the discriminatory purpose inquiry would impermissibly allow a denial of preclearance to be based solely on a Section 2 violation. J.S. App. 23a.[12] We contend, not that evidence of a Section 2 violation necessarily *suffices* to prove discriminatory purpose; see *Rogers*, 458 U.S. at 618; *Bolden*, 446 U.S. at 70, but that it is *relevant* to the purpose inquiry, see *Rogers*, 458 U.S. at 623-624; *Arlington Heights*, 429 U.S. at 265; see also *Arizona* v. *Reno*, 887 F. Supp. 318, 323-324 (D.D.C. 1995) (evidence relevant to Section 2 violation also relevant to Section 5 purpose inquiry), appeal dismissed, 116 S. Ct. 1037 (1996).[13] The district court erred as a matter of law in ignoring that probative evidence.

Second, the district court suggested that this Court's decision in *Miller* v. *Johnson*, 115 S. Ct. 2475 (1995), foreclosed any argument that the Board's adoption of a plan that it knew diluted minority voting strength evidenced its discriminatory purpose. J.S. App. 34a-36a. That is incorrect. In *Miller*, 115 S. Ct. at 2492-2493, the Court considered an ameliorative redistricting plan and

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[12] As we explain below, a violation of Section 2 provides an independent basis for denying preclearance. See Point II, *infra*.

[13] The district court erred in relying on *New York* v. *United States*, 874 F. Supp. 394, 398-400 (D.D.C. 1994), in support of its holding that evidence of a discriminatory effect that violates Section 2 "has no place" in a Section 5 case. J.S. App. 9a n.6, 22a-23a. The three-judge court in *New York* merely held that discriminatory purpose may not "*always* be inferred" from adoption of a system that has a discriminatory effect or, in the case of a redistricting plan, a dilutive impact, 874 F. Supp. at 399 (emphasis added); it did not hold, as did the district court below, that evidence of a discriminatory effect is *irrelevant* to the Section 5 purpose inquiry. See *ibid.* (citing *Arlington Heights*, 429 U.S. at 266).

held that purposeful refusal to subordinate traditional districting principles in order to "maximiz[e]" the number of majority-black districts fails to demonstrate purposeful discrimination. See also *Shaw* v. *Hunt*, No. 94-923 (June 13, 1996), slip op. 11-14 (*Shaw II*). Here, by contrast, the Board sought consciously to *minimize* the number of majority-black districts. Despite concentrations of black population, the Board adopted a plan that lacks any majority-black district, and that has had the clearly foreseeable effect of diluting minority voting strength, and the Board did so in circumstances strongly suggesting a discriminatory motivation. Such "conscious *minimizing* of black voting strength" is clearly relevant to a finding of discriminatory purpose. *Busbee*, 549 F. Supp. at 517 (emphasis added); see *id.* at 518.[14] Neither *Miller* nor *Shaw II* disturbed the well-settled rule that *Arlington Heights* provides the appropriate standard for determining discriminatory purpose under Section 5. Rather, the Court disagreed in those cases with the Attorney General's application of that standard to the particular plans submitted for preclearance. The Court's holdings cast no doubt on the continued application of traditional discriminatory purpose analysis in Section 5 cases.

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[14] The Court in *Miller* did not refuse to consider evidence of the effect of the challenged districting plan. In evaluating whether the plan there was adopted with a discriminatory purpose, the Court considered the plan's ameliorative impact. 115 S. Ct. at 2492. *Miller* is therefore fully consistent with the substantial precedent mandating consideration of the effect of a decision as one element in the totality of circumstances that indicates whether the decision was purposefully discriminatory. Indeed, throughout its *Miller* opinion, the Court cited *Arlington Heights* with approval. *Miller*, 115 S. Ct. at 2483, 2487, 2489. And while this Court recently expressed doubt that "a showing of discriminatory effect under § 2, *alone*, could support a claim of discriminatory purpose under § 5," it did not question the well-established proposition that disparate effects are *relevant* to discriminatory purpose. *Shaw* v. *Hunt*, slip op. at 14 n.6 (emphasis added).

Finally, the district court suggested that a purpose to cause retrogression in the electoral position of minority voters is the *only* type of discriminatory purpose cognizable under Section 5. J.S. App. 23a-24a (quoting *Texas* v. *United States*, Civ. Act. No. 94-1529 (D.D.C. July 10, 1995), slip op. 2-3. Under that approach, a jurisdiction that had never had a majority-minority district could never be found to have a discriminatory purpose in refusing to create such a district. This Court has expressly rejected that proposition. In *City of Richmond*, the Court concluded that the voting change under review there did not have an unlawfully retrogressive effect under Section 5, but it then remanded to the three-judge court for a determination whether the change had been adopted with a discriminatory purpose. Explicitly addressing the question "how it could be forbidden by § 5 to have the purpose and intent of achieving only what is a perfectly legal result under that section," the Court found it "plain" that a voting change made "for the purpose of discriminating against Negroes * * * has no legitimacy at all under our Constitution or under the statute" and "is forbidden by § 5, *whatever its actual effect may have been.*" *City of Richmond*, 422 U.S. at 378-379 (emphasis added). The Court reaffirmed that proposition in *City of Pleasant Grove* v. *United States*, 479 U.S. 462 (1987), explaining that a covered jurisdiction may not "short-circuit a purpose inquiry under § 5 by arguing that the intended result was not impermissible," because not retrogressive, "under an objective effects inquiry." *Id.* at 471 n.11. See also *City of Port Arthur* v. *United States*, 459 U.S. 159, 168 (1982) (noting that an electoral scheme adopted for a racially discriminatory purpose would be invalid even if it fairly reflected the political strength of a minority community).

Because of its failure to apply the correct legal standard to the Section 5 purpose inquiry, the district court's decision must be reversed. In this case, as in *Pullman-*

Standard v. *Swint*, the district court "failed to consider relevant evidence" and certainly "might have come to a different conclusion had it considered that evidence." 456 U.S. at 292. At a minimum, the district court's errors require a remand to permit that court to reevaluate the question of purpose in light of all of the relevant evidence.

B. Other Record Evidence, Together With the Evidence the District Court Erroneously Failed to Consider, Demonstrates That the Board Acted With a Discriminatory Purpose in Adopting the Police Jury Plan

The district court not only failed to consider relevant evidence, but also evaluated improperly the limited evidence it did consider. When all the relevant evidence is correctly considered, it supports only one conclusion: the Board acted with a racially discriminatory purpose in adopting the Police Jury plan.

1. Both the "specific sequence of events leading up" to the Board's decision to adopt the Police Jury plan and the substantive consequences of that decision demonstrate that the Board acted with a discriminatory purpose. See *Arlington Heights*, 429 U.S. at 267. The Board initially proceeded without urgency in its redistricting efforts, acting separately from the Police Jury. J.S. App. 4a, 92a (¶ 80). The Board did not even begin its redistricting process until after the Police Jury had completed its own process. At that point the Board hired the Police Jury's redistricting consultant, Gary Joiner, who estimated that it would take 200 to 250 hours to produce a plan for the School Board—far more time than would be necessary simply to adopt the Police Jury plan. *Id.* at 5a, 29a. Those initial decisions were consistent with the Board's needs, for the next Board election would not occur until more than three years after the Police Jury adopted its redistricting plan. *Id.* at 4a. The Board proceeded without haste from May, 1991, until the autumn of 1992.

It also best served the Board's interests to develop a redistricting plan separate from the Police Jury's. Although the two bodies both cover the same geographic area, and both consist of 12 members elected from single-member districts, the Board and the Police Jury had maintained different districts throughout the 1980s. They had done so because "[s]chool boards and police juries have different needs and different reasons for redistricting" in general. J.S. App. 72a (¶ 24). Moreover, the School Board and the Police Jury had divergent incumbency protection concerns (*id.* at 73a (¶ 26), 92a (¶ 81)), and the fact that the Board and the Police Jury had maintained separate districting plans in the previous decade resulted in a continuing divergence in incumbency interests during the post-1990 round of redistricting. *Id.* at 93a (¶ 84).

But the Board sharply changed course in September, 1992, after the local NAACP made clear that it would actively urge the adoption of a districting plan that did not dilute black voting strength. During the summer of 1992, the NAACP repeatedly requested that it be included in the redistricting process. J.S. App. 96a-101a (¶¶ 93, 94, 95, 97, 100, 106, 108); J.A. 125-129. However, when Joiner, the Board's cartographer, demonstrated alternative redistricting scenarios to the Board members, in the late summer of 1992, the NAACP was not informed. J.S. App. 97a (¶¶ 96, 97). At the September 3, 1992, meeting of the Board, NAACP President George Price presented the NAACP's 12-district plan, containing two districts with black voting-age majorities. *Id.* at 98a-99a (¶¶ 98-100). Two weeks later, without directing Joiner to conduct any further study of Price's plan, the Board unanimously passed a motion of intent to adopt the Police Jury plan, which contained no majority-black districts. *Id.* at 100a-101a (¶ 106). Despite unanimously negative public comment at an intervening hearing, the Board adopted the Police Jury plan on October 1 without

a single dissenting vote. *Id.* at 8a, 101a-102a (¶¶ 108-109).

As Judge Kessler concluded, "[t]he common-sense understanding of these events leads to one conclusion: The Board adopted the Police Jury plan—two years before the next election—in direct response to the presentation of a plan that created majority-black districts. Faced with growing frustration of the black community at being excluded from the electoral process, the only way for the School Board to ensure that no majority-black districts would be created was to quickly adopt the Police Jury plan and put the issue to rest." J.S. App. 49a-50a. That conclusion is bolstered by the Board's exclusion of minorities from any meaningful part in the redistricting process, see *Busbee*, 549 F. Supp. at 518, as well as the anomalous substantive consequences of importing the Police Jury's redistricting plan for use in School Board elections. Although the Board had long considered incumbency protection to be an important redistricting interest, the plan the Board adopted pitted incumbents against each other in two districts. J.S. App. 102a (¶ 109).[15] And while school board members "are typically concerned with having a public school or schools in each [School

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[15] One incumbent Board member who did not stand to lose from the adoption of the Police Jury plan was Tom Myrick. J.S. App. 95a (¶ 91). See page 11 & n.8, *supra*. The district court found it "understandable" that Myrick held a "strong desire not to have his district so changed that his constituency [was] obliterated" (J.S. App. 32a), but it is clear that Myrick recognized that preserving his existing constituency came at the necessary expense of dividing black voters in northern Bossier Parish among several districts. For Myrick, protecting his incumbency was thus inextricably intertwined with intentionally diluting black voting strength. See *Garza* v. *County of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990), cert. denied, 498 U.S. 1028 (1991); *id.* at 778-779 & n.1 (Kozinski, J., concurring in part and dissenting in part); *Ketchum* v. *Byrne*, 740 F.2d 1398, 1408 (7th Cir. 1984), cert. denied, 471 U.S. 1135 (1985); *Rybicki* v. *State Bd. of Elections*, 574 F. Supp. 1082, 1109 (N.D. Ill. 1982) (three-judge court).

Board] district," some districts in the Police Jury plan did not contain a single school. *Id.* at 73a (¶ 24). Where, as here, "the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached," a powerful inference of discrimination arises. *Arlington Heights*, 429 U.S. at 267 & n.17.

2. Board members' own statements of opposition to "black representation" and "drawing majority-black districts," J.S. App. 31a-32a; *id.* at 53a-54a, also show that the Board acted with a discriminatory purpose. Two Board members reported that others on the Board were "hostile" or "opposed" to the idea of black representation on the Board, or a majority-black School Board district. J.A. 93, 123; J.S. App. 31a-32a. A third, who represented a district that included portions of a predominantly black community that, if not divided, could comprise part of a black-majority district north of Bossier City, insisted that "he had worked too hard to get [his] seat and that he would not stand by and 'let [them] take his seat away from him.'" J.A. 124, 134; J.S. App. 53a, see page 11, *supra*.

The district court erred in its interpretation of those statements. J.S. App. 31a-32a. When all relevant evidence is taken into account, the statements clearly indicate, contrary to the district court's conclusion, a purpose to prevent "the presence of black persons as members of the School Board." *Id.* at 31a. The district court reasoned that opposition to "the intentional drawing of majority-black districts in order to ensure black representation on the Board" is "hardly an indication of discriminatory purpose unless section 5 imposes an affirmative obligation to draw additional [*sic*] majority-black districts." *Ibid.* Although the refusal to draw compact majority-black districts is not always probative of discriminatory intent, in the circumstances of this case the Board's avowed refusal to do so communicated a clear message of opposition to black representation. In circumstances where following traditional districting principles would lead to the drawing of majority-black districts,

purposefully avoiding drawing them is probative of racially discriminatory purpose. See, *e.g.*, *Garza* v. *County of Los Angeles*, 918 F.2d 763, 770-771 (9th Cir. 1990), cert. denied, 498 U.S. 1028 (1991); *Busbee*, 549 F. Supp. at 517. The Police Jury plan plainly disserved the Board's interests in incumbency protection and distribution of schools among districts. In the face of unquestioned evidence of dilution, of the Board's history of discrimination, of the suspect timing of the Board's decision to adopt the Police Jury plan, and of the Board's shifting justifications, the only plausible explanation for the Board's choice of the Police Jury plan was that the Board adopted that plan in order to dilute the effectiveness of black votes. Where, as here, the Board knew that failure to draw majority-black districts would perpetuate black vote dilution, its expressed opposition to doing so is evidence of its racially discriminatory purpose.

The district court concluded that "at least a majority of the white Board members were responsive to the black community and were not opposed to black representation on the School Board." J.S. App. 30a. In support of that conclusion, it pointed to only one fact—the Board's appointment of a black member, Jerome Blunt, to a vacant School Board post. *Ibid.* But that appointment was plainly a meaningless palliative. As Judge Kessler noted, "Mr. Blunt was appointed to represent a district that was only 11% black, and his short [six-month] tenure on the job was a stark reminder of the highly polarized voting in Bossier Parish." *Id.* at 54a n.9. (Blunt lost to a white challenger. *Id.* at 100a (¶ 105)). Moreover, the circumstances of Blunt's appointment were themselves suspicious—the appointment occurred "at the very meeting where the Board adopted a motion of intent to adopt the Police Jury plan." *Id.* at 54a n.9. From the circumstances, it appears that "the School Board appointed a black to fill a seat they knew he would be unable [to] hold, hoping to quell the political furor over the adoption of the Police Jury plan." *Ibid.* This Court has noted

that the ephemeral success of black candidates in such circumstances does not warrant the drawing of favorable inferences. See *Thornburg* v. *Gingles*, 478 U.S. 30, 75-76 & n.37 (1986).

C. The District Court Erred in Finding That the Board Had Any Legitimate, Nondiscriminatory Reason for Adopting the Police Jury Plan

The district court found that the Police Jury plan "offered the twin attractions of guaranteed preclearance and easy implementation (because no precinct lines would need redrawing)," and that those were legitimate nondiscriminatory reasons for adopting that plan. J.S. App. 27a-28a. Those factors were, however, not the Board's actual reasons, nor were they nondiscriminatory. The district court's conclusion that the Board acted for nondiscriminatory reasons was infected by the court's artificially restricted view of the relevant evidence, and was, in any event, clearly erroneous.

Any interest the Board had in "guaranteed preclearance" was simply a means of effectuating the Board's purposeful dilution of minority voting strength. The Board showed no concern at all with "guaranteed preclearance" until the local NAACP made clear that it would oppose preclearance of any plan that continued to shut out minority voters. As Judge Kessler noted, "[i]f guaranteed preclearance was what the Board wanted, it would have acted soon after the Police Jury Plan was precleared by the Justice Department on July 29, 1991," rather than waiting for more than a year to adopt that plan. J.S. App. 58a.

Moreover, the fact that the Police Jury plan had previously been precleared might have recommended it over other plans comprised exclusively of white-majority districts, but fails as a rationale for the Board's selection of the Police Jury plan over any less dilutive plan. The Board could not realistically have believed that a plan

that ameliorated the existing dilution would be *less* likely to receive preclearance than the Police Jury plan. "[G]uaranteed preclearance" was a plausible motivation for adopting the Police Jury plan only if the School Board was firmly intent on continuing to use a plan with *no* majority-black districts and it wanted assurance that it could do so without drawing an objection from the Attorney General. In short, "[t]he Police Jury plan only became 'expedient' when the School Board was publicly confronted with alternative plans demonstrating that majority-black districts could be drawn, and demonstrating that political pressure from the black community was mounting to achieve such a result." J.S. App. 49a.[16]

The prospect of "easy implementation (because no precinct lines would need redrawing)," J.S. App. 28a, also was not an actual, nondiscriminatory reason for the Board's adoption of the Police Jury plan that it initially had rejected. The court suggested that "the School Board entirely reasonably *could have*, when faced with the NAACP's plan, arrived quickly at the conclusion that zero precinct splits was significantly more desirable than 46," *id.* at 29a (emphasis added), but did not find that the Board actually reached such a conclusion. The correct focus in determining the purpose behind the adoption of the disputed plan is on the Board's *actual* purpose *at the time* it adopted that plan. *City of Pleasant Grove*, 479 U.S. at 470 (rejecting argument "developed after the fact"

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[16] For similar reasons, the district court's view that the Board's adoption of a dilutive plan was "an understandable, if not necessarily laudable, retreat from a protracted and highly charged public battle," J.S. App. 34a, does not support its conclusion that such a retreat amounted to a nondiscriminatory reason for adoption of the Police Jury plan. The only "public battle" the School Board faced arose from black citizens' opposition to the strongly dilutive effect of any plan with exclusively white-majority districts, and the Board "retreat[ed]" from it by deliberately excluding black voters from any meaningful participation in the process. See *id.* at 58a n.12.

because it was "not the true basis" for decision); cf. *United States* v. *Virginia*, No. 94-1941 (June 26, 1996), slip op. 18 ("[A] tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded."); *id.* at 2-3 (opinion of Rehnquist, C.J., concurring).

The evidence shows that splitting precincts was simply never a concern for the Board during its redistricting process, but was only an excuse manufactured to justify its refusal to draw a non-dilutive plan. The Board had anticipated splitting precincts from the very beginning of the process. J.S. App. 29a, 95a (¶ 89). There is no finding that the Board ever considered the relative number of precinct splits, or their potential cost, as factors in selecting a plan. The Board did not ever "voice its concern about *too many* precinct splits causing higher election costs in its initial submission" for preclearance, nor did it "estimate[] the cost of splitting precincts before it voted to adopt the Police Jury plan." *Id.* at 57a. And the Board never considered measures that would have reduced the number of precinct splits in the NAACP plan. *Id.* at 100a-101a (¶ 106). Although the Board's cartographer and attorney asserted that the NAACP plan could not be considered because its "district lines crossed existing precinct lines, and therefore violated state law," *id.* at 99a (¶ 102), 6a, both those Board representatives knew at the time that they were free to request that the Police Jury realign the parish's precincts—a process that is both legal and common in Louisiana. *Id.* at 6a-7a, 99a-100a (¶ 102); see page 9, *supra*. They never approached the Police Jury to explore whether it was willing to take that step. *Ibid.*

The Board's proffered justifications of "guaranteed preclearance and easy implementation" were further rendered implausible by the fact that the Board raised them in conjunction with a number of other justifications that lacked credibility. As the district court acknowledged, "[i]n the

course of litigation, the School Board has offered several reasons for its adoption of the Police Jury plan that clearly were not real reasons." J.S. App. 27a n.15. The Board asserted, for example, that it had adopted the Police Jury plan to comply with this Court's decision in *Shaw* v. *Reno*, 509 U.S. 630 (1993)—a decision that was not rendered until almost nine months after the Board adopted the plan. J.S. App. 27a n.15. Other clearly pretextual reasons proffered by the Board included its stated desire to avoid voter confusion by adopting the same boundaries for the Police Jury and School Board districts. Pltff's Exh. 16 (Myrick testimony), at 4. The voter-confusion rationale was raised for the first time *post hoc*, in the Board's Section 5 submission, see J.S. App. 156a, and was not a genuine Board interest, given that (a) Louisiana jurisdictions commonly have different School Board and Police Jury districts; (b) the Board had had districts different from those of the Police Jury for more than a decade; and (c) the Board had not seriously considered adopting the same districts as the Police Jury until it was faced with the black community's request that it adopt a non-dilutive plan, see *id.* at 49a-50a, 72a (¶ 22). The fact that the Board has proffered shifting, insupportable justifications for its decision further supports a finding that it discriminated.[17]

Where "the record permits only one resolution of the factual issue" of intentional discrimination, reversal is appropriate. *Swint*, 456 U.S. at 292. As we have demonstrated, Judge Kessler was correct that, when all the relevant evidence is considered, the record "demonstrates

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[17] See, *e.g.*, *Southwest Merchandising Corp.* v. *NLRB*, 53 F.3d 1334, 1344 (D.C. Cir. 1995); *EEOC* v. *Ethan Allen, Inc.*, 44 F.3d 116, 120 (2d Cir. 1994) (citing cases); see also *St. Mary's Honor Center* v. *Hicks*, 509 U.S. 502, 511 (1993) ("The factfinder's disbelief of the reasons put forward by the defendant (particularly if * * * accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination.").

conclusively that the Bossier School Board acted with discriminatory purpose." J.S. App. 39a. The judgment of the district court should be reversed and the case remanded for entry of a declaratory judgment that the appellee failed to meet its burden to show lack of discriminatory purpose under Section 5.

II. A PLAN THAT DILUTES MINORITY VOTING STRENGTH IN VIOLATION OF SECTION 2 OF THE VOTING RIGHTS ACT IS NOT ENTITLED TO PRECLEARANCE UNDER SECTION 5 OF THE ACT

It has long been established that retrogression in the voting strength of minority voters constitutes a discriminatory effect precluding preclearance under Section 5. See *Miller*, 115 S. Ct. at 2483; *City of Lockhart* v. *United States*, 460 U.S. 125, 134 (1983); *Beer* v. *United States*, 425 U.S. 130, 141 (1976). In *Beer*, 425 U.S. at 141, 142 n.14, the Court stated that a nonretrogressive but unconstitutionally dilutive voting change also violates Sections. In amending the Voting Rights Act in 1982, Congress, referring to that statement in *Beer*, indicated that vote dilution in violation of amended Section 2 should preclude preclearance under Section 5 as well: The Senate Judiciary Committee Report on the amendments stated that, "[i]n light of the amendment to section 2, it is intended that a section 5 objection also follow if a new voting procedure itself so discriminates as to violate section 2." S. Rep. No. 417, 97th Cong., 2d Sess. 12 n.31 (1982). Accordingly, the Department of Justice's regulations establishing procedures for the implementation of Section 5 provide that, even where a "submitted change is free of discriminatory purpose and retrogressive effect," the Attorney General nonetheless shall withhold preclearance where "a bar to implementation of the change is necessary to prevent a clear violation of amended Section 2." 28 C.F.R. 51.55(b)(2). Whether Congress viewed

vote dilution in violation of Section 2 as a prohibited discriminatory "effect" under Section 5, or, alternatively, as an equitable defense that should preclude a declaratory judgment under Section 5, Congress intended that such a violation should be a bar to preclearance.

1. a. Both Section 2 and Section 5 prohibit the discriminatory denial or abridgement of voting rights. Section 5 precludes preclearance of voting changes that will have the discriminatory "effect" of "denying or abridging the right to vote," and Section 2 prohibits the use of voting practices that "result[]" in a discriminatory "denial or abridgment of the right * * * to vote." It is well established that a showing of discriminatory purpose is not required in order to show either discriminatory "effect" or discriminatory "results." The similarity in meaning of the terms "effect" and "results" suggests that Congress viewed vote dilution that amounts to a discriminatory "result[]" under Section 2 as also constituting a prohibited discriminatory "effect" under Section 5. Especially in view of Section 5's purpose to prevent the perpetuation of discriminatory electoral systems by jurisdictions with a history of voting discrimination, *South Carolina* v. *Katzenbach*, 383 U.S. 301, 328 (1966), the bar on discriminatory "effect[s]" in Section 5 is most naturally read to incorporate the Section 2 prohibition on discriminatory vote dilution.

Reading Section 5 as prohibiting preclearance of voting changes that violate Section 2 is also supported by equitable principles governing declaratory judgments. Section 5 specifies a declaratory judgment action as the mechanism by which judicial preclearance may be obtained. See also 28 C.F.R. 51.52(a) (in determining whether to object to a proposed change, the Attorney General "shall make the same determination that would be made by the court in an action for a declaratory judgment"). The Declaratory Judgment Act provides that any federal court that otherwise has jurisdiction "*may* declare the rights and other legal relations of any interested party." 28

U.S.C. 2201 (emphasis added). The declaratory judgment remedy is "equitable in nature," and "equitable defenses may be interposed," *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 155 (1967), including one based on the principle that equity withholds its assistance from persons using the asserted right in a manner contrary to the public interest. *Morton Salt Co.* v. *G.S. Suppiger Co.*, 314 U.S. 488, 492-493 (1942); see *Wilton* v. *Seven Falls Co.*, 115 S. Ct. 2137, 2143 (1995) (district courts have "unique breadth of * * * discretion to decline to enter a declaratory judgment"); *Public Serv. Comm'n* v. *Wycoff Co.*, 344 U.S. 237, 241 (1952) (Declaratory Judgment Act "confers a discretion on the courts rather than an absolute right upon the litigant"); *Eccles* v. *Peoples Bank*, 333 U.S. 426, 431 (1948) ("A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest.").

Discriminatory vote dilution in violation of Section 2 is manifestly contrary to the public interest, and is thus an appropriate ground for denial of a declaratory judgment of preclearance. "Congress intended § 5 to have 'the broadest possible scope.'" *Morse* v. *Republican Party of Virginia*, 116 S. Ct. 1186, 1198 (1996) (opinion of Stevens, J.) (quoting *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 566-567 (1969)). It would be an "anomalous result"—one Congress plainly did not intend —if the preclearance requirement were no bar to "voting practices known to be illegal" under Section 2. *Morse*, 116 S. Ct. at 1201 & n.25 (opinion of Stevens, J.). Thus, preclearance should be denied to a voting change when it is known that the change will result in the unlawful dilution of minority voting strength, regardless of whether the change was instituted for a discriminatory purpose or had a retrogressive effect.

b. The question whether discriminatory vote dilution violates Section 5 first arose in *Beer* v. *United States*, 425

U.S. 130 (1976). In *Beer*, the Court stated that Section 5's prohibition of discriminatory effects sought principally "to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise," *id.* at 141; a nonretrogressive change could not violate Section 5, the Court concluded, "unless the [change] itself so discriminates on the basis of race or color as to violate the Constitution." *Ibid.* *Beer* cited the cases of discriminatory vote dilution as examples of non-retrogressive yet unconstitutional changes that would violate Section 5. 425 U.S. at 142 n.14 (citing, *inter alia*, *White* v. *Regester*, 412 U.S. 755 (1973)).

At the time *Beer* was decided, the Court's decision in *White* v. *Regester* established the standard for unconstitutional racial vote dilution. Under that standard, a plaintiff could prove unconstitutional vote dilution by demonstrating that "the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." 412 U.S. at 766. When this Court in *Beer* referred to a change that "itself so discriminates * * * as to violate the Constitution," it was referring to a change that violated *White* v. *Regester*'s vote dilution standards. See *Beer*, 425 U.S. at 141, 142 n.14 ("It is possible that a legislative reapportionment could be a substantial improvement over its predecessor in terms of lessening racial discrimination, and yet nonetheless continue so to discriminate on the basis of race or color as to be unconstitutional.") (citing, *inter alia*, *White* v. *Regester*, *supra*).

Because vote-dilution standards under the Constitution and Section 2 were generally coextensive at the time *Beer* was decided, *Beer*'s discussion meant that practices that violated Section 2 would not be entitled to preclearance

under Section 5. Subsequently, however, in *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980), the Court held that proof of discriminatory purpose was necessary to establish unconstitutional vote dilution. Concluding that *Bolden*'s purpose test put plaintiffs to an inappropriately difficult burden, Congress amended Section 2 in 1982 to codify, as the statutory standard for proving unlawful dilution, the discriminatory "results" test originally set forth in *White* v. *Regester*. See *Gingles*, 478 U.S. at 43-44. Amended Section 2 thus prohibits any practice "which results in a denial of abridgement" of the right to vote on the basis of race or color. 42 U.S.C. 1973(a). Tracking the language in *White* v. *Regester*, Section 2 provides that a violation will be established if "the political processes leading to nomination or election * * * are not equally open to participation by members of a [protected class] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. 1973(b). The 1982 amendments also extended Section 5's preclearance requirement, which was due to expire on August 8, 1982. Pub. L. No. 97-205, § 2(b)(4), 96 Stat. 133 (1982).

c. In enacting the 1982 amendments, Congress sought to reaffirm the principle, articulated in *Beer*, that a voting change that illegally dilutes minority voting strength is not entitled to preclearance under Section 5. The Senate Report to the 1982 amendments made that point explicit:

> Under the rule of *Beer* v. *United States*, 425 U.S. 130 (1976), a voting change which is ameliorative is not objectionable unless the change "itself so discriminates on the basis of race or color as to violate the Constitution." 425 U.S. at 141; *see also* 142 n.14 (citing to the dilution cases from *Fortson* v. *Dorsey*[, 379 U.S. 433 (1965),] through *White* v. *Regester*). In light of the amendment to section 2, *it is intended that a section 5 objection also follow*

> *if a new voting procedure itself so discriminates as to violate section 2.*

S. Rep. No. 417, 97th Cong., 2d Sess. 12 n.31 (1982) (emphasis added). The Senate Report is the "authoritative source" for determining Congress's intent in enacting those amendments. *Gingles*, 478 U.S. at 43 n.7. Congress thus approved *Beer*'s interpretation of the Act to require a denial of preclearance to changes that unlawfully dilute minority voting strength. It made clear its intention that that interpretation would apply to violations of the amended Section 2. See *Morse*, 116 S. Ct. at 1201 n.52 (opinion of Stevens, J.).[18]

The House Report to the amendments similarly concluded that a Section 2 violation should result in the denial of preclearance under Section 5:

> Under the Voting Rights Act, whether a discriminatory practice or procedure is of recent origin affects only the mechanism that triggers relief, i.e., litigation [under Section 2] or preclearance [under Section 5]. The lawfulness of such a practice should not vary depending on when it was adopted, i.e., whether it is a change.

H.R. Rep. No. 227, 97th Cong., 1st Sess. 28 (1981). The House Report "indicates that the substantive stand-

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[18] The Senate Report's reference to *Beer* also shows that Congress viewed vote dilution as a prohibited "effect" under Section 5. In a discussion focussing on Section 5's effects test, the *Beer* Court referred to a dilutive change as one that would not simply bar preclearance for equitable reasons independent of Section 5's terms, but that would "violate § 5" itself. While noting that an ameliorative change would not ordinarily "have the 'effect' of diluting or abridging the right to vote on account of race," the *Beer* Court concluded that an ameliorative change *would* have such an effect if it were unlawfully dilutive under the non-purpose-based *White* v. *Register* vote-dilution standard—the standard that the 1982 Congress reinstated in amended Section 2. *Beer*, 425 U.S. 141, 142 n.14.

ards for § 2 and § 5 violations are the same, so long as the challenged practice represents a change from 1965 conditions" such that Section 5 is triggered. *Morse*, 116 S. Ct. at 1201 n. 25 (opinion of Stevens, J.). That result makes sense because, "[i]f § 5 were narrower than § 2, then a covered jurisdiction would not need to preclear changes in voting practices known to be illegal." *Id.* at 1201. Because Congress approved of this existing reading of Section 5, there was no reason to amend Section 5 in 1982.[19]

The legislative background thus establishes that changes that violate Section 2 are not entitled to preclearance. As this Court has ruled in interpreting the Voting Rights Act, "[w]hen a Congress that re-enacts a statute voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation, and this Court is bound thereby." *United States* v. *Board of Comm'rs*, 435 U.S. 110, 134 (1978). The district court erred in ruling to the contrary.

d. Administrative and legislative actions after enactment of the 1982 amendments confirm that voting changes that dilute minority voting strength under Section 2 are not entitled to preclearance. In 1985, the Department of Justice issued the first set of proposed Section 5 regulations following the Act's amendment. See 50 Fed. Reg. 19,122. One of the proposed regulations (28 C.F.R. 51.56(c)(1)) required the Attorney General to withhold preclearance "based upon violation of Section 2." 50 Fed. Reg. at 19,131. As finally adopted, the Department's regulation requires that preclearance be withheld where "a bar to implementaton of the change

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[19] The Court has reserved the specific question whether a violation of amended Section 2 requires the denial of preclearance. *City of Lockhart* v. *United States*, 460 U.S. 125, 133 n.9 (1983) (referring to appellee Cano's argument); see also 81-802 Brief for Appellee Cano at 48-52, *Lockhart, supra*.

is necessary to prevent a clear violation of amended section 2." 28 C.F.R. 51.55(b)(2).[20]

Congress held oversight hearings on the proposed regulations, in which the Assistant Attorney General for Civil Rights testified in detail that Section 5 objections might be based on clear Section 2 violations. See *Proposed Changes to Regulations Governing Section 5 of the Voting Rights Act: Oversight Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 149, 151-152 (1985) (*Oversight Hearings*) (statement of Wm. Bradford Reynolds). Witnesses noted that, not only had Congress in 1982 intended that Section 5 preclearance be denied on the basis of violation of Section 2, but that concerns of judicial and administrative economy also supported that construction. The facts relevant to vote dilution in violation of Section 2 are usually also relevant to purpose under Section 5. See, *e.g.*, *Johnson* v. *De Grandy*, 114 S. Ct. 2647, 2656-2657 & n.9 (1994) (Senate report [21] or "*Zimmer*" [22] factors relevant to Section 2

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[20] The regulation authorizes the Attorney General to deny preclearance to prevent a "clear" violation of Section 2. 28 C.F.R. 51.55(b)(2) (J.S. App. 168a). The undisputed evidence in this case established such a clear Section 2 violation. The Court thus need not reach the question whether the "clear violation" standard applies in judicial proceedings. We note, however, that the preamble to the Department's final Section 5 regulation states that the "clear violation" standard was incorporated to account for the limitations inherent in the administrative preclearance process, including a 60-day time limit for making preclearance determinations, the lack of hearing procedures or subpoena power, and the absence of a formal record. 52 Fed. Reg. 487 (1987). Under such procedural limitations, it might not be possible to detect a violation unless it was clear from the submission.

[21] S. Rep. No. 417, 97th Cong., 2d Sess. 28-30 (1982).

[22] *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973), aff'd *sub nom. East Carroll Parish School Bd.* v. *Marshall*, 424 U.S. 636 (1975).

vote dilution); *Rogers*, 458 U.S. at 620-622 (*Zimmer* factors relevant to purpose under Section 5); see also 52 Fed. Reg. at 487 ("the analysis used in the Section 5 preclearance process requires evaluation of precisely the same factors that Congress specified as being relevant to a determination under Section 2"). "To hold that section 2 is not fully applicable would mean that the section 2 issues would invariably have to be tried in another forum"—"a prescription for more litigation and a waste of the resources of the parties, the Department of Justice, and the courts." *Oversight Hearings* at 47 (testimony of Laughlin McDonald).

Following the oversight hearings, the House Judiciary Subcommittee on Civil and Constitutional Rights issued a report. The report expressly endorsed the Department's construction of Section 5 as authorizing objections on the basis of Section 2 violations:

> [T]he Subcommittee concludes that it is a proper interpretation of the legislative history of the 1982 amendments to use Section 2 standards in the course of making Section 5 determinations.

Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 99th Cong., 2d Sess., *Ser. No. 9, Voting Rights Act: Proposed Section 5 Regulations* 5 (Comm. Print 1986). Congress's failure to alter the enforcing agency's policy, after full review of that policy, "make[s] out an unusually strong case of legislative acquiescence in and ratification by implication of" the agency's position. *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 599, 601-602 (1983).

e. Particularly in light of the close congressional oversight, the Department's regulation is entitled to "great deference." *United States* v. *Board of Comm'rs*, 435 U.S. at 131-132. The district court, however, incorrectly refused to accord any deference to the Department's interpretation of the Act. It reasoned that deference is

inappropriate where the federal courts have concurrent authority to interpret a statute in the first instance, as they do under Section 5. J.S. App. 18a-19a (citing *Litton Fin. Printing Div.* v. *NLRB*, 501 U.S. 190, 203 (1991)). That reasoning is squarely contrary to this Court's long and consistent practice of deferring to the Attorney General's reasonable constructions of Section 5. See, *e.g.*, *Presley* v. *Etowah County Comm'n*, 502 U.S. 491, 508 (1992); *City of Pleasant Grove*, 479 U.S. at 468; *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166, 178-179 (1985); *United States* v. *Board of Comm'rs*, 435 U.S. at 131-132.[23]

2. None of the reasons the district court gave supports its rejection of the clear congressional intent and consistent administrative construction establishing that changes violating Section 2 are not entitled to preclearance under Section 5.

The district court relied on the use of different terms—"results" in Section 2 and "effect" in Section 5—to conclude that the statutory text "unambiguous[ly]" rejected the principle that Section 5 preclearance can be denied based on a Section 2 violation. J.S. App. 17a-18a. Congress's use of different terms in the two sections is best explained, however, not as expressing a decision that Section 5 must tolerate unlawful vote dilution, but as indicating that retrogression is a discriminatory effect under Section 5, see *Beer*, 425 U.S. at 141, whereas retrogres-

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[23] *Litton* did not hold otherwise. It held that it is inappropriate to defer to an agency's decision on a non-statutory matter that the courts normally have the primary power to determine, and that therefore lies outside the agency's area of special competence. 501 U.S. at 202 (noting that the NLRB's decision was "not grounded in terms of any need * * * 'to effectuate the policies of the Act,'" but rather was based on construction of a contract, for whose interpretation "'[a]rbitrators and courts are still the principal sources"). The Court reaffirmed in *Litton* that the NLRB's interpretations of statutory language were entitled to "substantial deference." *Id.* at 201-202.

sion, standing alone, is not a discriminatory "result" under Section 2, see *Johnson* v. *De Grandy*, 114 S. Ct. 2647, 2654-2657 (1994).[24]

The district court also noted that the allocation of the burden of proof differs under Section 5 and Section 2, and concluded that "[t]hat crucial procedural difference strongly suggests the inappropriateness of importing section 2 standards into section 5." J.S. App. 16a. The Court's language in *Beer*, however, suggests that the burden to show dilution as a bar to preclearance remains with the Attorney General. In noting that vote dilution can be a basis for denying preclearance, the Court stated that "[*t*]*he United States has made no claim* that [the disputed plan] suffers from any such disability, nor could it rationally do so." 425 U.S. at 142 n.14 (emphasis added). Thus, in ratifying *Beer*'s approach in the 1982 Voting Rights Act amendments, Congress likely contemplated that the United States bears the burden to make out a Section 2 claim as a basis for defeating preclearance, just as it ordinarily would as a plaintiff in Section 2 litigation. In addition, to the extent that the rule requiring denial of preclearance to unlawfully dilutive changes derives from the equitable public interest defense to a declaratory judgment action, that reasoning also would place the burden of proof of a Section 2 violation on the United States. The United States has, in practice, therefore assumed the burden to prove a Section 2 violation as a basis for denial of Section 5 preclearance.

Finally, the district court read this Court's decision in *Miller* as "repudiat[ing] the Department's interpretation of section 5," and as establishing that "section 5 and its standards have no place in a section 5 preclearance action." J.S. App. 21a, 23a. But *Miller* did not address

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[24] Moreover, even if Section 5's "effect" language does not encompass nonretrogressive dilution, established equitable principles support denial of preclearance to unlawfully dilutive redistricting plans. See pages 34-35, *supra*.

the issue whether preclearance should be withheld on the basis of a Section 2 violation, for the Section 5 objection at issue there was based exclusively "on the ground that the submitted plans violated § 5's purpose element." *Miller*, 115 S. Ct. at 2492. As noted, *Miller* held that forbidden purpose could not be inferred from the jurisdiction's decision not to subordinate traditional districting principles so as to maximize the number of majority-minority districts. *Id.* at 2489-2490, 2492. But *Miller* did not hold that preclearance must be granted in the face of a Section 2 violation, *i.e.*, where racially polarized voting deprives minority voters of an equal opportunity to elect their chosen candidates, and it is possible to create "more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of their choice." *De Grandy*, 114 S. Ct. at 2655. Congress plainly did not intend that "anomalous result." *Morse*, 116 S. Ct. at 1201 & n.25 (opinion of Stevens, J.).

CONCLUSION

The judgment of the district court should be reversed and the case remanded for entry of a declaratory judgment that the redistricting plan at issue is not entitled to preclearance under Section 5. In the alternative, the judgment should be reversed and the case remanded for further proceedings to consider, under proper legal stan-

dards, the evidence concerning discriminatory purpose and dilutive effect.

Respectfully submitted.

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AUGUST 1996

☆ U. S. GOVERNMENT PRINTING OFFICE: 1996 405017 40166

Supreme Court, U.S.
FILED
AUG 1 1996
CLERK

(13) (12)

Nos. 95-1455 & 95-1508

IN THE

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OCTOBER TERM, 1996

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES,
Appellant, and
GEORGE PRICE, *et al.*,
Appellants,
v.
BOSSIER PARISH SCHOOL BOARD,
Appellee.

On Appeal from the United States District Court for the District of Columbia

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BRIEF OF APPELLANTS GEORGE PRICE, ET AL.

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QUESTIONS PRESENTED

I. Whether evidence probative of discriminatory purpose under *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), may be excluded from consideration in a preclearance action under Section 5 of the Voting Rights Act solely because that evidence also would be relevant to a discrimination action brought under Section 2 of the Act.

II. Whether evidence probative of discriminatory purpose under *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), may be excluded from consideration in a preclearance action under Section 5 solely because the election plan at issue is not retrogressive.

III. Whether the court in a Section 5 preclearance action may itself assume the burden of explaining and rebutting clear evidence of discriminatory purpose when the covered jurisdiction fails to carry that burden.

IV. Whether a covered jurisdiction meets its burden of proof in a Section 5 preclearance action when it merely identifies some nondiscriminatory reasons for its redistricting plan, but fails to rebut clear evidence showing other discriminatory reasons for the plan.

V. Whether the fact that a nonretrogressive voting change would result in a clear violation of Section 2 constitutes an independent basis for the denial of preclearance under Section 5.

PARTIES TO THE PROCEEDINGS

The Defendant-Intervenors below, Appellants George Price, *et al.*, who are not listed in the caption are:

Leroy Harry
Thelma Harry
Clifford Doss
Otis Easter
Jerry Hawkins
Barbara Stevens King
Hurie Jones
Grover Cleveland Jaggers
Floyd Marshall
Rubie Fowler

All other parties are named in the caption.

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OPINIONS BELOW

The decision of the United States District Court for the District of Columbia ("D.C. District Court") is reported at 907 F. Supp. 434 (D.D.C. 1995). App. 1a-65a.[1]

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[1] In this brief, citations are to the Appendix ("App.") filed with the Jurisdictional Statement of Janet Reno, *et al.*, on March 11, 1996, including the numerous stipulations of the parties ("Stip."); to the Joint Appendix ("J.A.") filed on August 1, 1996; to the transcript of the hearing in the D.C. District Court on April 10 and 11, 1995 ("Tr."); and to exhibits submitted at that time by the appellee ("Plaintiff's Exh."), and the two appellants, Janet Reno

JURISDICTION

The decision of the three-judge panel of the D.C. District Court, which had jurisdiction pursuant to 42 U.S.C. § 1973c, was entered on November 2, 1995. The Attorney General's notice of appeal was filed on December 27, 1995. App. 163a-164a. The notice of appeal on behalf of defendant-intervenors George Price, *et al.* ("Defendant-Intervenors"), was filed on January 2, 1996. On February 28, 1996, the Chief Justice extended the time in which to file a jurisdictional statement on behalf of Defendant-Intervenors to March 18, 1996. The Attorney General and Defendant-Intervenors timely filed jurisdictional statements, and the Court noted probable jurisdiction on June 3, 1996. The Court has jurisdiction over this appeal pursuant to 42 U.S.C. § 1973c.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." The Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." Sections 2 and 5 of the Voting Rights Act, 42 U.S.C. § § 1973, 1973c, are reproduced in the Appendix to the Jurisdictional Statement filed by Janet Reno in No. 95-1955. App. 165a-167a.

("U.S. Exh.") and defendant-intervenors George Price, *et al.* ("D-I Exh.").

STATEMENT OF THE CASE

I. INTRODUCTION

This case concerns the actions of the 12-member Bossier Parish School Board ("Bossier" or the "Board"). In Bossier Parish, racially polarized voting and majority-white, single-member districts precluded blacks from ever being elected to the Board, even though they make up 20% of the populace. Year in and year out the 12 majority-white districts elected all-white boards, and year in and year out the interests of blacks in participating in educational policy-making and in advancing the long-delayed desegregation of the schools was thwarted.

Nevertheless, in its 1990 redistricting, the School Board refused even to consider a plan that would have created a majority-minority district, even though two such districts could have been drawn. Worse, in order to avoid drawing such a district and in order again to draw 12 majority-white districts, the Board transgressed many of its own redistricting criteria; *i.e.*, it forced incumbents to run against each other, it drew one district containing almost half of the Board's entire geographic jurisdiction and others that are not compact by the admission of the Board's own consultant, and it created some districts without any schools in them at all and that ignored school attendance zones. Furthermore, the explanations offered by the Board for adopting such districts were plainly pretextual, and statements by individual Board members confirmed the Board's intent to prevent blacks from electing their candidates of choice.

In these circumstances, and under the well-established standards articulated by this Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), the Attorney General not surprisingly refused preclearance under Section 5 because the Board's redistricting plan had been adopted with a discriminatory purpose. But, by a 2-1 vote, the

three-judge court below, failing to apply the proper legal standard, held that the Board had met its burden of proving that racial discrimination was not a factor in the adoption of its redistricting plan.

As we will show, the majority was able to reach this result only by refusing to consider most of the critical evidence of record, and by offering justifications for the rest that even the Board itself had not offered. As we will also show, the majority's approach flatly contradicts this Court's requirements that the Board itself establish the absence of any discriminatory purpose and that all relevant information be considered in determining whether the Board met that burden. When those requirements are followed, as Judge Gladys Kessler held in dissent below, the evidence of record "demonstrates overwhelmingly that the School Board's decision ... was motivated by discriminatory purpose." App. 63a.

It would be anomalous if this Court now rejected Judge Kessler's diligent application of Section 5's purpose prong, for in order to guarantee constitutional Equal Protection the Court recently has imposed stringent requirements on states openly seeking to draw majority-minority districts. *See Shaw v. Hunt,* Nos. 94-923 and 94-924, 1996 WL 315870 (U.S. June 13, 1996) *("Shaw II")*; *Bush v. Vera*, Nos. 94-805, 94-806 and 94-988, 1996 WL 315857 (U.S. June 13, 1996). If, at the same time, the Court endorsed the majority's truncated purpose inquiry and abandoned the rigorous standards it has traditionally applied to jurisdictions seeking to perpetuate the long-standing exclusion of blacks from full participation in the political process, the result would be to subvert the central premise of the Fourteenth Amendment. As Justice O'Connor has recently written, "the driving force behind the adoption of the Fourteenth Amendment was the desire to end legal discrimination against blacks." *Miller v. Johnson,* 115 S. Ct. 2475, 2497 (1995) (O'Connor, J., concurring). *See also Vera*, 1996 WL 315857, at *24 (O'Connor, J.,

concurring). The Bossier Parish School Board contradicted this fundamental proposition in this case, and its action should not be upheld by this Court.

II. STATEMENT OF FACTS

The facts in this case are largely undisputed and are nearly all either stipulated or unrebutted. Rather, the dispute in the case is over which of these facts may be taken into account in determining whether the Board met its burden to show that its redistricting plan was in no part motivated by a discriminatory purpose. Three kinds of facts are relevant to that issue: (a) the demographics of Bossier Parish and the longstanding exclusion of blacks from the School Board; (b) the prior undisputed discrimination against blacks in voting and in the Parish's schools, and the ongoing exclusion of blacks from any policy-making role in the schools; and (c) the circumstances surrounding the adoption of the redistricting plan.

A. Voting Polarization and the Exclusion of Blacks From the Board

In 1990, blacks comprised 20.1% of the total population of Bossier Parish, and 17.6% of the voting age population. App. 2a. Blacks also comprised 29% of the students in the Parish's public schools. *Id.* at 4a n.2.

The parties stipulated and the court below found that the black population of the Parish is concentrated in two areas; more than 50% of the black residents live in Bossier City, App. 2a; *id.* at 68a (Stip. 10), and another significant percentage of those residents is concentrated in communities in the northern rural portion of the Parish. *Id.*

Stipulated facts and unrebutted testimony also show that black voters in Bossier Parish are politically cohesive. *See, e.g.,* App. 123a (Stip. 184). The parties likewise agreed to facts showing that voting in the Parish is racially polarized, *id.* at 40a, 122a-27a (Stip. 181-96),

and that "voting patterns in Bossier Parish are affected by racial preferences," *id.* at 122a (Stip. 181). Similarly, the stipulated facts leave no doubt that whites vote sufficiently as a bloc to enable them usually to defeat the preferred candidates of black voters. App. 127a (Stip. 196). Finally, the record showed that, as a result of these factors, no black candidate had ever been elected to the School Board. App. 4a, 40a-41a.[2]

The record furthermore showed that the creation of 12 majority-white election districts was not dictated by adherence to traditional redistricting principles. As found by Judge Kessler—the only member of the panel to address the stipulated facts concerning the Parish's demographics—"it was clearly possible to draw a redistricting plan for the Bossier Parish Schools with one or two majority-black districts, and still respect traditional districting principles." App. 41a. The majority made no contrary finding. Likewise, Judge Kessler found, and again the majority did not dispute, that "the Board's plan presents the black minority of Bossier Parish with no

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[2] This Court properly refused to supplement the record with information concerning the fact that no white candidate ran in one district and a black candidate defeated a white candidate in another district in School Board elections held *after* the district court's decision below. *Reno v. Bossier Parish Sch. Bd.*, 116 S. Ct. 1540 (1996). As this Court recently indicated in *Vera*, reliance on election results after the redistricting has been completed "is misplaced." 1996 WL 315857, at *12 fn. This is because evidence of events that occurred after the Board's decision cannot illuminate its intent at the time it made the decision. *See, e.g., McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879, 885 (1995); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250, 252 (1989); *id.* at 261 (O'Connor, J., concurring). This is particularly true where, as here, the pending litigation itself may well have had an impact on the election. *See, e.g., Thornburg v. Gingles*, 478 U.S. 30, 76 (1986); *Clark v. Calhoun County*, 21 F.3d 92, 96 (5th Cir. 1994).

realistic opportunity to elect any candidates of its choice to any of the board seats." App. 41a.

B. Prior Uncontested Discrimination in Voting and Education, and the Exclusion of Blacks From Educational Policymaking

The uncontested evidence also detailed the long history of discrimination against blacks in Bossier Parish. *See* App. 42a-46a; 130a-40a (Stip. 214-48). Judge Kessler, again the only member of the panel to consider this evidence, chronicled in detail the stipulated facts showing that many decades of discriminatory government action in Bossier Parish had resulted in the large-scale disenfranchisement of black voters. App. 42a-44a. Following the passage of the Thirteenth Amendment, Louisiana enacted laws intended to reduce black voting; black registration decreased by 90% within a few years. App. 43a; *id.* at 130a-31a (Stip. 215-19). In 1921, an amendment to the State Constitution required persons seeking to register to vote to "give a reasonable interpretation" of a constitutional provision. *Id.* at 44a, 132a (Stip. 221). That amendment, which disenfranchised most black citizens, was not invalidated until 1965. *Louisiana v. United States*, 380 U.S. 145 (1965). After an all-white Louisiana Democratic primary was invalidated, the party then adopted an anti-single-shot law and a majority-vote requirement for party office. App. 43a-44a; *id.* at 132a (Stip. 222); *Major v. Treen*, 574 F. Supp. 325, 341 (E.D. La. 1983).

In addition to this discrimination in voting, which affected all of the Parish's governing bodies, the Board itself also maintained *de jure* segregation in its schools long after *Brown v. Board of Education*, 347 U.S. 483 (1954). App. 44a-46a; App. 136a (Stip. 235). While the Board has been a defendant for more than 30 years in the school desegregation case of *Lemon v. Bossier Parish School Board*, C.A. No. 10,687 (W.D. La.), Judge Kessler noted that it still has not fulfilled its constitutional obligations to remedy segregation and

establish a unitary school district. App. 45a. *See Lemon v. Bossier Parish Sch. Bd.*, 240 F. Supp. 709 (W.D. La. 1965), *aff'd*, 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967).

More significantly, since 1980 the schools in Bossier Parish have become increasingly segregated by race. App. 45a ("the number of elementary schools with predominantly black enrollments has increased from one to four"); *id.* at 137a-38a (Stip. 240-42). While the District's total school enrollment is only 29% black, Bossier and Butler Elementary Schools, whose attendance areas are adjacent to one another in Bossier City, were 77% and 74% black in 1994, U.S. Exh. 84YY, compared to 39% and 44% black in 1980. U.S. Exh. 84KK. Likewise, both schools in Board Member Thomas Myrick's district in the northern portion of the Parish have become more than 75% black. J.A. 150 (Myrick).

The Board not only failed in its affirmative duty to desegregate, but also violated the specific terms of the outstanding consent decree in *Lemon*. App. 45a. For example, while the consent decree requires the Board to follow the *Singleton* standards and assign teachers to schools by race in approximately their proportion in the District as a whole, the Board has assigned black teachers disproportionately to predominantly black schools, such as Bossier and Butler Elementary Schools, contributing to their increasing racial identifiability. *See Singleton v. Jackson Mun. Separate Sch. Dist.*, 419 F.2d 1211, 1218 (5th Cir. 1969), *cert. denied sub nom. West Feliciana Parish Sch. Bd. v. Carter*, 396 U.S. 1032 (1970); App. 137a-38a (Stip. 239-40); J.A. 179 (Lewis) (admitting *deliberate* assignment of more than 70% black faculty to predominantly-black Butler Elementary School, despite the fact that district-wide black faculty had declined to less than 10%); Plaintiff's Exh. 14 at 4 (Lewis).

The Defendant-Intervenors repeatedly have tried—but unsuccessfully—to persuade the Board to address these

and other concerns about the treatment of black school children in Bossier Parish. *See* App. 96a-97a, 104a, 105a, 137a-38a (Stip. 95, 115, 117, 240). U.S. Exh. 32 at 50 (Board Minutes). For example, appellant George Price, the president of the local NAACP, repeatedly has asked the Board to attempt to hire more black teachers. App. 96a-97a, 104a, 105a (Stip. 95, 115, 117). Since 1980, the percentage of black teachers in the District, however, has fallen from 14% to less than 10%. App. 137a-38a (Stip. 240).

The Board has remained nonresponsive to all these concerns, despite a court-ordered obligation to maintain a bi-racial committee to "recommend to the School Board ways to attain and maintain a unitary system and to improve education in the parish." App. 103a-06a (Stip. 111-17). For decades, the Board ignored this requirement altogether. *Id.* at 103a-04a (Stip. 112). In 1993, the Board established a committee ostensibly to serve this function. *Id.* at 104a (Stip. 113). However, when black members of the committee raised not only problems, but potential solutions as well, the Board unilaterally disbanded the committee. *Id.* at 105a (Stip. 116). As Board members Thomas Myrick and Barry Musgrove explained in their direct testimony, Plaintiff's Exh. 15 at 15 (Musgrove); Plaintiff's Exh. 16 at 16 (Myrick), they did not want this committee getting into "policy" questions. *Id.* Judge Kessler found that as a result the Board "unilateral[ly] dismantl[ed] the Committee . . . in direct violation of a federal court order to address the concerns of the black community." App. 46a.

The effects of this longstanding discrimination continue to affect both the school children of Bossier Parish and its adult voters. "Black citizens of Bossier Parish suffer a markedly lower socioeconomic status than their white counterparts" that is "traceable to a legacy of racial discrimination affecting Bossier Parish's black citizens." *Id.* at 128a (Stip. 200); *see id.* at

127a-30a (Stip. 197-213). Judge Kessler alone reviewed these stipulated facts and their consequences, App. 52a-53a, and she concluded that "the depressed socioeconomic and educational levels" of blacks within Bossier Parish "make it hard for them to obtain necessary electoral information, organize, raise funds, campaign, register, and turn out to vote, and this in turn causes a depressed level of political participation for blacks within Bossier Parish." App. 52a.

This history of discrimination and its effects is important in this case for two reasons: it forms an important backdrop to the Board's redistricting decision, and it explains why black citizens were so concerned that a majority-minority district be fairly considered in that process.

C. The Redistricting Process

The Board's redistricting decision occurred in four stages: first was the prior adoption and preclearance of a plan by the governing body of the Parish, the Bossier Parish Police Jury ("Police Jury"); next was the Board's decision not to adopt the same plan approved by the Police Jury, but to formulate one of its own; third was the reversal of that decision and the hasty adoption of the Police Jury plan, despite its departures from the School Board's own redistricting criteria and notwithstanding rising support in the Parish for a majority-minority district; finally came the Board's series of shifting pretextual explanations for its decision, rationalizations that continued to change from the administrative preclearance process through the proceedings in the court below.

1. Police Jury Redistricting. Throughout the 1980s the Police Jury and the School Board had different election districts. App. 72a (Stip. 22). Although not required by law, both had 12 single-member districts during the 1980s. *Id.* Moreover, both had 12 majority-white districts. App. 2a-4a. Population changes

required each to reapportion after the 1990 Census. App. 3a-4a.

The Police Jury's redistricting efforts preceded the School Board's. During the Police Jury's redistricting process, the white Police Jurors and their cartographer Gary Joiner were "specifically aware that a contiguous black-majority district could be drawn both in northern Bossier Parish and in Bossier City." App. 76a (Stip. 36), 82a-83a (Stip. 53), 114a (Stip. 148). In fact, the parties stipulated that it was "obvious that a reasonably compact black-majority district could be drawn within Bossier City." App. 76a (Stip. 36). The Police Jurors also were aware that alternate configurations for a contiguous majority-black district in the northern part of the Parish could be created. App. 114a (Stip. 148).

However, they deliberately misled the public, *id.* at 83a (Stip. 54), the only black police juror, *id.* at 80a-81a (Stip. 47), and the Attorney General herself, *id.* at 87a (Stip. 65-66), by claiming that drawing any majority-black district was impossible. App. 3a. Despite these misrepresentations, some black community groups opposed the plan and specifically asked that their letter expressing concerns about it be included in the Police Jury's Section 5 submission. App. 3a; *id.* at 69a, 87a (Stip. 11, 65-66). Nevertheless, Joiner and the Police Jury did not include it. App. 87a (Stip. 65-66).

One of the School Board members, Thomas Myrick, participated in between five and ten private meetings about the Police Jury's redistricting with Joiner and white police jurors. App. 5a; *id.* at 81a, 93a-94a (Stip. 48, 85).[3] Mr. Myrick lives in an area that the

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[3] Despite the Board's stipulations about Myrick's meetings with Joiner and the Police Jurors, App. 81a, 93a-94a (Stip. 48, 85), and Joiner's live testimony about "probably half a dozen" such meetings, J.A. 161-64 (Joiner), Myrick denied on the witness

parties stipulated "would likely be included in any majority-black district to be drawn in the northern part of Bossier Parish." *Id.* at 81a (Stip. 48). Myrick was concerned about his district, J.A. 162-63 (Joiner), and indicated to Joiner in these meetings that he did not want a majority-black district. *Id.* at 163.

In April 1991, the Police Jury adopted a reapportionment plan with all majority-white districts. App. 3a, 68a (Stip. 11). As the majority found, Myrick later would be the first to recommend this plan to his fellow Board members. App. 5a. He also took the lead in the Board's redistricting process, and several other Board members deferred to him. *See, e.g.*, U.S. Exhs. 95 at 34-35 (Jackson); 100 at 71 (Rodgers); 86 at 37-38 (Barerra).

On May 28, 1991, the Police Jury submitted its redistricting plan to the Attorney General seeking preclearance under Section 5. As noted, the Police Jury withheld from its submission the complaints of black citizens and the information revealing that reasonably compact majority-black districts could be created. App. 68a-69a (Stip. 11). On July 29, 1991, based on this incomplete information, the Attorney General precleared the plan. *Id.* at 3a, 68a-69a (Stip. 11).

The Police Jury's 1991 redistricting plan cut across many of the precinct lines established in the 1980s to facilitate elections under the Parish's various election plans. App. 88a (Stip. 70). Indeed, the new plan resulted in the creation of 20 additional precincts (for a total Parish-wide of 56). *Id.;* D-I Exh. G ¶ 36 (Cooper). Police juries are empowered by state statute to establish such new precincts. App. 70a (Stip. 15).

The Police Jury's plan not only diluted minority voting strength, but it also drew precinct lines that severely

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stand that any of them took place. J.A. 150-51, 156-57 (Myrick). The majority rejected Myrick's testimony. App. 5a.

fragmented black communities: only two of the Police Jury's 56 precincts are majority black, and they contain only 3,000 of the Parish's 86,000 people. Tr. I at 177-78 (Joiner).

2. The School Board's Initial Decision. School boards in Louisiana do not possess independent authority to establish or change precinct lines themselves; if a school board and police jury have the same number of election districts, the board's election districts must be composed of whole precincts established by its police jury. App. 71a (Stip. 21). Nevertheless, school boards are not bound to employ their police juries' redistricting plans or to use their original election precincts. Instead, in practice school boards have three options: first, they could fashion election plans different from those adopted by their police juries, but with the same number of districts and using the post-1990 precincts established by their police juries; second, they could choose election plans with a different number of election districts than their police juries, La. R.S. 17:71.3E; or third, they could develop election plans independently and then have their police juries create new precincts to accommodate both election plans. App. 72a (Stip. 22); *see also* J.A. 136-43(Creed).

The undisputed evidence showed and the majority found that the third option was quite common. App. 6a-7a. Moreover, there was no evidence showing that any police jury had ever denied a school board's request to alter precinct lines to accommodate a school board's favored redistricting plan.

As the majority found and the parties stipulated, the Board in this case entered the redistricting process well aware that if it did not adopt the Police Jury's plan it likely would need to have new precincts established. App. 29a; *id.* at 95a (Stip. 89). While, in October of 1990, the Board had directed its superintendent to contact the Police Jury about jointly developing an election plan, the Police Jury had not been interested,

App. 93a (Stip. 83, 84), and the Board hoped that it "could derive [its] own plan." Tr. I. at 44 (Musgrove).

Moreover, when the Board began its redistricting process in earnest it envisioned this prospect and hired Gary Joiner to perform 200 to 250 hours of work, far more than would be necessary simply to recreate the Police Jury plan. *Id.* at 94a (Stip. 86-87). After the Police Jury plan received preclearance in the summer of 1991, however, Thomas Myrick suggested that the Board adopt the Police Jury plan. App. 5a. Nevertheless, on September 5, 1991, the School Board decided not to adopt the Police Jury plan. *Id.* As Judge Kessler found, the Board rejected the already-precleared Police Jury plan "largely because it would pit incumbents against each other." App. 47a. *See also* App. 5a (majority's finding that "[n]o action was taken on Myrick's proposal"); *id.* at 8a (majority's finding that plan "pits two pairs of incumbents against each other, leaving two districts with no incumbents").

As a result, over the course of the next year, School Board members considered a number of different redistricting options, *id.* at 47a, including adjusting their 1980 plan, U.S. Exh. 98 at 18 (Hensley), or developing a plan with five, seven or nine districts, Tr. I at 44 (Musgrove). The Board's cartographer Gary Joiner met privately with the members and demonstrated different possibilities to them on his computer. App. 47a; App. 97a (Stip. 96). These meetings were not open to the public, nor were there any recorded minutes or published notices of the meetings. *Id.* at 47a. According to Joiner, moreover, all records of the alternatives considered by the Board disappeared in a series of computer disasters. J.A. 165-66 (Joiner).

3. The School Board's Reversal of its Initial Decision and Refusal to Consider Proposals from the Black Community. Meanwhile, as Judge Kessler described it, "[w]hile the School Board was meeting and planning in private, the black community was trying,

unsuccessfully, to participate in public." App. 47a. On March 25, 1992, George Price wrote to the Board requesting that a coalition of black community groups be included in the redistricting process. App. 5a; App. 47a; *id.* at 96a (Stip. 93). The Board neither responded to this letter nor took any action to include the NAACP, other black civic groups, or Mr. Price in the redistricting effort. *Id.* In August 1992, Mr. Price sent another letter asking to be involved. J.A. 126-27. Again, the Board made no response. App. 47a.

Frustrated by the Board's unresponsiveness, Price contacted the NAACP Redistricting Project in Baltimore, Maryland and asked it to evaluate the public assertions that no single-member districts could be drawn in Bossier Parish without a white majority. App. 47a-48a; App. 98a (Stip. 98). In response, the Project developed a partial plan for Price to present to the School Board that consisted of two hypothetical majority-black districts. *Id.* at 48a. The majority below found that when Price provided this information to the Board he was told that it would not even be considered because it did not contain an election plan for the entire Parish. App. 6a. Price therefore went back to the Project and had a complete 12-district illustrative plan drawn up, one that included ten majority-white districts. *Id.*

Nevertheless, when Price presented this completed plan at a public Board meeting on September 3, 1992, the Board summarily dismissed it, claiming that without a larger map the information could not be considered. App. 98a-99a (Stip. 100). Significantly, the parties stipulated that this plan demonstrated that "two contiguous districts with a black voting age population majority can be drawn within Bossier Parish for the Bossier Parish School Board." *Id.* at 113a (Stip. 143).

The majority found that Mr. Price also was told at the time that because the plan appeared to split precincts it could not be considered. App. 6a; *id.* at 48a, 98a-100a (Stip. 100-02). Yet, until that time, as the majority

expressly recognized, the Board had been actively considering alternatives to the Police Jury plan, all of which likely would have split precincts. *See* App. 29a; *id.* at 72a (Stip. 23); J.A. 168 (Joiner). The Board furthermore knew at the time that it was legal and feasible to draw districts that split precincts. App. 7a (quoting *id.* at 72a (Stip. 23) (Board "free to request precinct changes from the Police Jury")); *id.* at 72a, 99a-100a (Stip. 22, 102).

Despite having received an illustrative plan demonstrating the concentration of black populations in the Parish and the feasibility of drawing compact majority-minority districts, the Board did not ask its cartographer to do any further study. App. 48a. App. 100a-01a (Stip. 106). Neither did it attempt to ascertain how many of the Police Jury's newly established precincts would be split by the NAACP plan or any other plan including a majority-black district. *See* U.S. Exh. 102 ¶ 17 (Blunt); Tr. I at 164-65 (Joiner).[4] Likewise, the Board made no effort to ascertain the extent of any costs that might be associated with a plan that split precincts. *Id.; see also* J.A. 170-75 (Joiner).

At the Board's next regular meeting, on September 17, 1992, Mr. Price again asked the Board to consider the implications of the NAACP's illustrative plan. App. 48a, 100a-01a (Stip. 106). The Board refused, immediately passing a motion of intent to adopt the

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[4] The Board's cartographer later conceded that a majority-black district in Bossier City would require only 14 precinct splits, and a plan with two majority-black districts would require 27. Tr. I at 152 (Joiner). Unrebutted testimony also established that the newly created precincts required for a plan with two majority-black districts could be consolidated with existing precincts to reduce the total number of precincts from the current 56 to 46. D-I. Exh. G ¶ 36 (Cooper).

Police Jury plan, which it had previously found unsatisfactory. *Id.* at 100a (Stip. 106).

Around this time, a narrow majority of the Board appointed Jerome Blunt as the first black person ever to serve on the Board. App. 7a. Blunt was appointed to a six-month term representing an 89% white district. *Id.* He was sworn in at the September 17, 1992, meeting but was defeated by a white candidate in the special election six months later. *Id.* As Judge Kessler found:

> Certainly, Board members knew that adopting the Police Jury plan would ignite controversy in the black community. And on the very night of that decision, the School Board appointed a black to fill a seat that they knew he would be unable to hold, hoping to quell the political furor over adoption of the Police Jury plan. [App. 54a n.9.]

On September 18, 1992, Mr. Price again wrote the Board, this time joined by a number of other community leaders, and asked it to "give the plan submitted by the NAACP [its] utmost consideration and . . . use it as a foundation" to create a plan that included majority-black districts. J.A. 128-29. The Board again did not respond.

At the legally required public hearing concerning the Board's proposed redistricting plan, many Bossier Parish voters continued to express their concerns about the Board's precipitous embrace of the Police Jury plan. An overflow crowd attended the hearing, which was held on September 24, 1992. App. 7a-8a, 48a. Fifteen people spoke against the School Board's proposed plan, most of whom objected because it would dilute minority voting strength. App. 8a; *id.* at 101a (Stip. 108). Significantly, *not one* person spoke in favor of the plan. *Id.* Furthermore, more than 500 Bossier Parish citizens presented the Board with a petition, asking it to consider an alternative redistricting plan. *Id.* at 7a-8a. This was the largest petition presented to the Board on any subject in years. App. 101a (Stip. 108).

At the September 24 hearing, Mr. Price explained in detail why the Board's alleged concerns about precinct-splitting did not justify the adoption of a plan like the Police Jury's that diluted minority voting strength. J.A. 122 (Price); J.A. 130-32; Tr. I at 52 (Myrick). He also pointed out that Mr. Joiner's public statements on behalf of the Board—that state precinct-splitting limitations prevented it from considering the NAACP's illustrative plan or any plan with a majority-black district—were completely false. *Id.*

Neither at this hearing nor at its other meetings did the Board members explain on the record any reasons for their support of the Police Jury plan. *See* U.S. Exhs. 7-36. Instead, the Board's minutes reflect only an unexplained retreat to the Police Jury plan that it had rejected a year earlier. U.S. Exhs. 32, 34, 36. Thus, no perceived strengths of the Police Jury plan are discussed or documented anywhere on the public record of the Board's action.

In contrast, both the majority and the dissent below agreed that the Police Jury plan had several significant flaws from the Board's own perspective. App. 8a; *id.* at 50a. Indeed, the plan violated many of the redistricting criteria that Board members had relied upon until the NAACP's demonstration that election plans with majority-black districts were possible. For example, the Police Jury plan pitted School Board incumbents against one another in two districts. *Id.* at 8a. Likewise, as the majority recognized, the Police Jury plan distributed schools unevenly, with some election districts containing no schools and other districts containing several. *Id.* at 8a; *see also* 72a-73a, 112a (Stip. 24, 141).

The plan also contained one district that included "almost half of the geographic area in the Parish," App. 50a, several others that were not compact according to the Board's own cartographer, Tr. I at 175 (Joiner), and one district that was not contiguous. D-I Exh. G ¶32 (Cooper). The plan also violated a state law requirement

that no election districts deviate from the one-person, one-vote ideal by more than 5%. *Id.* ¶31; La. R.S. 17:71.3 E(2)(a) and E(3)(a). Judge Kessler therefore concluded that "the Board's plan plainly violates a whole number of redistricting principles." App. 51a.

Despite these obvious substantive problems with the Police Jury plan, App. 50a-51a, the one-sided input from Bossier citizens concerned about its adoption, App. 7a-8a, and the fact that the Board was under no time pressure to decide the issue, App. 4a, the Board voted, at its very next meeting on October 1, 1992, to adopt the plan. App. 49a. As with the meetings of September 3 and September 17, 1992, the minutes of this meeting reflect virtually no substantive consideration of the plan. *See* U.S. Exhs. 7-36. While Jerome Blunt encouraged the other Board members to explore the issues being raised by the black community, the Board refused. J.A. 88-89 (Blunt); U.S. Exh. 36 at 67. Thomas Myrick, in the one verbatim statement concerning redistricting recorded in two years of Board minutes, told Blunt that this was not a question of "black and white" but of "majority rule." U.S. Exh. 36 at 67. Mr. Blunt abstained from the vote in protest, *id*; J.A. 88-89, but the white majority present voted unanimously for the Police Jury plan. App. 8a.

In these circumstances, as Judge Kessler found, "[f]aced with growing frustration of the black community at being excluded from the electoral process, the only way for the School Board to ensure that no majority-black districts would be created was to quickly adopt the Police Jury plan and put the issue to rest." App. 49a-50a. The majority similarly concluded that "[w]hen . . . the redistricting process began to cause agitation within the black community, . . . the Police Jury plan became, as Board member Thomas Myrick described it, 'expedient.'" App. 28a.

What Myrick described on the stand as "expediency," he and other Board members were more candid about in

private. Myrick, for example, told two black voters from northern Bossier Parish that he would not "let [them] take his seat away from him." App. 6a n.4. J.A. 123-24 (Price); D-I Exh. E ¶ 19 (Harry). The Board's own cartographer similarly testified that Myrick had indicated to him that he wanted to avoid the creation of any majority-black districts. J.A. 163-64 (Joiner). Board member Henry Burns told another black voter that other Board members "oppose the idea" of "black representation on the Board." App. 5a-6a n.4. J.A. 93 (Davis). And Barry Musgrove, another Board member told George Price that "there was nothing more he could do . . . [on the redistricting issue] because the Board was 'hostile' toward the idea of a black majority district." App. 6a n.4; J.A. 123 (Price).

As a result of this hostility, the Board adopted a plan that it had previously rejected and that diluted minority voting strength. Because, as noted, voting in Bossier Parish is racially polarized, App. 122a-27a (Stip. 181-96), the foreseeable impact of the Board's plan was to reduce the chances of black voters being able to elect candidates of their choice. App. 41a. According to the Board's own consultant, Gary Joiner, the adopted plan unnecessarily fragmented or "fractur[ed]" predominantly black residential areas. *Id.* at 111a (Stip. 137). Joiner defined fracturing as "taking a cohesive minority population which exhibits traits of commonality (communities of interest) and purposefully splitting it among adjoining, often white majority districts." Report of Gary D. Joiner on Behalf of Plaintiff (October 20, 1994). Dr. Castille, an opinion witness called by the Attorney General, confirmed Joiner's admission that, in the Bossier City area surrounding the two 75%-plus black elementary schools, Bossier and Butler, the Board's plan "effectively divided well-established neighborhoods that are predominantly black." J.A. 103-04 (Castille); *id.* at 102-03 (describing similar "fracturing" in Benton area in the northern portion of the Parish).

The Board members indisputably knew about these black neighborhoods and intentionally kept them together in drawing school attendance areas. U.S. Exhs. 86-101. Indeed, virtually every Board member sought to justify schools being more than 75% black by referring to predominantly black neighborhoods surrounding the schools.[5] Yet their election plan split neighborhoods around predominantly black schools. Moreover, the Board stipulated to facts showing that its plan does "not respect communities of interest in Bossier Parish." App. 50-51a (citing Stip. 135-57). Judge Kessler, who alone among the panel evaluated the effect of the plan and the historical background of the Board's decision, found that the Board split these black communities in drawing election districts because it wanted to impede black voters—who share serious concerns about the treatment of black children in the public schools—from electing candidates of their choice. App. 46a.

4. Post-hoc Rationalizations for the Board's Decision. In subsequent efforts to justify the unexplained reversal of its initial decision and its refusal to consider alternatives from the black community, the Board offered the Attorney General and the District Court a series of pretextual explanations, including several which the majority itself found "clearly were not real reasons." App. 27a n.15. For example, the School Board argued that it adopted the Police Jury plan (on October 1, 1992) to comply with *Shaw v. Reno,* 113 S. Ct. 2816 (1993) (decided June 28, 1993) ("*Shaw I*"), even though *Shaw I* was decided nine months after the Board adopted its plan. *Id.*

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[5] *See* J.A. 68 (Barerra); J.A. 69 (Blaylock); J.A. 70-71 (Burns); J.A. 72 (Gray); J.A. 73 (Jackson); J.A. 74-75 (Harvey); J.A. 76 (Hensley); J.A. 78-80 (Hudson); J.A. 81 (Rodgers); J.A. 83 (Sullivan).

The School Board also reiterated its claim that it could not adopt a plan with fewer than 12 majority-white districts because any such plan would require precinct-splitting, which it erroneously claimed violates state law. App. 56a. The majority found, however, that when "the School Board began the redistricting process, it likely anticipated the necessity of splitting some precincts." App. 29a. Indeed, as Judge Kessler found, "[i]t was only *after* the black community presented its alternative plan that the School Board proffered the 'no precinct-splitting' rationale." App. 56a (emphasis in original). Furthermore, as earlier noted, while the Board itself may not split precincts, police juries have the authority to establish and modify precinct lines, and many do so when requested by a school board. *Id.* at 69a-73a, 85a-86a (Stip. 13-25, 60-61). Here, as the majority found, the School Board never made such a request. App. 7a. Finally, the Board never expressed any concern about the fact that the Police Jury plan itself violated state law in other ways because its districts were not all contiguous and its deviation exceeded plus-or-minus 5%. *See* D-I Exh. G ¶¶ 31-32.

Nor did the School Board voice any concern in its initial submission to the Attorney General about a high number of precinct splits causing higher election costs, as it subsequently claimed. App. 57a. In fact, the Board never even estimated the cost of splitting precincts before it voted to adopt the Police Jury plan. *Id.* Obviously, "cost" did not actually motivate the School Board's decision at the time it was made. *Id.*

Bossier's final proffered justification for adopting the Police Jury plan was that it guaranteed preclearance; that is, the Attorney General would approve the School Board's plan because it was identical to the Police Jury plan which already had been precleared. App. 57a-58a. However, "guaranteed preclearance" was not the School Board's objective; if it had been, the Board would not have waited until October 1, 1992—almost 14 months

after the Police Jury plan was precleared—to adopt it. *Id.* Moreover, adopting a plan with one or more majority-black districts certainly would not have made preclearance *less likely*; quite the contrary, given the Board's history and the Attorney General's position, the Board could not reasonably have believed that a plan that would both honor traditional districting principles and improve the opportunity of black citizens to participate in the political process would have had *less chance* of preclearance than the Police Jury plan.

III. THE PROCEEDINGS BELOW

A. The Attorney General's Denial of Preclearance

While the Board had acted precipitously in approving its redistricting plan on October 1, 1992, it did not submit its plan to the Department of Justice for preclearance until January 4, 1993. App. 103a (Stip. 110). After requesting additional information, the Attorney General interposed a timely objection to Bossier's plan. *Id.* at 154a, 106a-07a (Stip. 118-19).

The Attorney General noted that new information had made clear that it was possible to draw one or more majority-black districts in Bossier Parish. App. 154a. In its Section 5 submission, the Board's only rationale for refusing to consider this possibility was its claim that drawing a majority-black district would split precincts. *Id.* The Attorney General, however, pointed out that there was no evidence that the Board had ever requested that the Police Jury realign precincts. *Id.* As the majority found, the Board never attempted this option. App. 7a.

The Board then moved for reconsideration. But rather than submitting any additional analyses by its consultant or requesting a precinct realignment from the Police Jury, the Board proffered new pretextual justifications for its plan, including the claim discussed above—which the majority below found to be obviously false, App. 27a-28a n.15—that it had been attempting to avoid racial

gerrymandering under *Shaw I*. The Attorney General denied the request for reconsideration on December 20, 1993. *Id.* at 159a, 108a (Stip. 125).

B. The Declaratory Judgment Action

On July 8, 1994, Bossier filed this action against the Attorney General in D.C. District Court. A group of black voters in Bossier Parish, George Price, *et al.*, intervened as defendants in support of the Attorney General. These Defendant-Intervenors suggested to the three-judge court that it should decide this case based solely on the issue of discriminatory purpose under Section 5.

The Attorney General agreed that the evidence clearly established discriminatory purpose, but also argued that much of the same evidence established a clear violation of Section 2 and that such a violation constitutes independent grounds for denying preclearance. Rather than face the costs of defending a Section 2 lawsuit, Bossier itself stipulated that "[s]ection 5 preclearance . . . must be denied if the plan violates Section 2." App. 11a n.7; *id.* at 144a (Stip. 257). The court below, however, rejected this invitation from the parties and ruled that a Section 2 violation is not a valid ground for denying Section 5 preclearance. *Id.* at 11a-24a.

The majority went much further, however, ruling that no "*evidence* of a section 2 violation" may be used to establish "discriminatory purpose under section 5." App. 23a (emphasis added). Ignoring the fact that much of the same evidence used in establishing a Section 2 violation is probative of discriminatory purpose under Section 5, and ignoring *Arlington Heights* and other precedents of this Court, the majority flatly held that it would "not permit *section 2 evidence* to prove discriminatory purpose." *Id.* at 24a (emphasis added).

In addition, misapplying this Court's decision in *Miller v. Johnson*, the majority refused to consider the adverse effect of the plan on black voters as evidence of

discriminatory purpose. Instead, the majority held that "the adoption of one nonretrogressive plan [that contains no majority-black districts] rather than another nonretrogressive plan that contains [some] majority-black districts cannot by itself give rise to the inference of discriminatory purpose." App. 35a. As a result of these two legal errors, the majority excluded from its consideration much of the evidence of discriminatory purpose in this case.

The majority not only ignored probative evidence, it also shifted the burden of proof away from Bossier to the Attorney General by offering its own speculation about the meaning of prior statements by Board members—statements which revealed the Board's discriminatory purpose and as to which the Board itself had offered no explanation. *See id.* at 30a-32a.

Finally, the majority concluded that the School Board had two nondiscriminatory motives: "guaranteed preclearance" and "easy implementation (because no precinct lines would need redrawing)." App. 27a-28a. While the dissent effectively exposes these two rationales as pretextual, App. 56a-59a, the majority also erred by holding that proof of some legitimate motives was sufficient to meet the Board's burden of proof. The majority thus ignored the evidence of record that the Board's action was motivated at least in part by other purposes that were discriminatory such as: diluting black voting strength; continuing to avoid the need to address the concerns of its black patrons about the operation of Bossier's public schools; and protecting Board member Thomas Myrick's seat.

Judge Kessler, alone among the panel, considered the entire "extensive record" below and applied the *Arlington Heights* standard. She concluded that Bossier had "woefully failed to satisfy" its burden of proving that it acted solely with "legitimate, nondiscriminatory motives." App. 59a, 37a (quoting *New York v. United States,* 874 F. Supp. 394, 400 (D.D.C. 1994)). Indeed,

Judge Kessler, looking at all the evidence, found that it "demonstrates conclusively," indeed "overwhelmingly," that "racial purpose fueled the School Board's decision." *Id.* at 39a, 63a.

SUMMARY OF THE ARGUMENT

This Court's precedents require a thorough and sensitive inquiry into a wide range of evidence to determine whether a racially discriminatory purpose was a motivating factor in the redistricting decision of a jurisdiction subject to Section 5. Indeed, the Court's most recent cases also make quite clear that the Court will not accept at face value a state's explanations for apparent discriminatory treatment but will carefully probe those explanations to determine whether a prohibited discriminatory purpose in fact animated the state's actions.

The majority below did not conduct the careful probing required by this Court; the majority completely failed even to undertake the inquiry long required by *Arlington Heights* and held instead that much of the evidence of discriminatory intent in this case could not be considered *at all* because it also would be relevant to a discrimination claim under Section 2 of the Voting Rights Act. This ruling is contrary to this Court's precedents and profoundly illogical. Evidence of an action's discriminatory effect on black voters is clearly relevant to the question of whether a government body acted with discriminatory purpose. Likewise, an ongoing history of intentional discrimination against the same group is at least probative of the government actor's motivation. As this Court recognized in *Arlington Heights* and *Rogers v. Lodge*, 458 U.S. 613 (1982), a variety of factors bearing on the context of an official decision may reveal its intent. By refusing even to consider such evidence of discriminatory purpose, which it dubbed "Section 2 evidence," the majority started with the assumption that the Board "did nothing bad" and only then asked if "it

did so with a non-bad motive." App. 25a n.13. This clear legal error compels reversal.

The majority also committed three other legal errors in assessing the Board's discriminatory purpose. First, the majority erroneously held that evidence of the discriminatory impact of an election plan with no majority-black districts may not be considered if the plan is not retrogressive. Second, the majority improperly supplied its own rebuttal to Board-member statements indicating discriminatory intent. And third, the majority incorrectly held that the mere presence of some legitimate, nondiscriminatory reasons for the Board's decision is sufficient in and of itself to satisfy Section 5's discriminatory purpose prong. All of this is contrary to this Court's decisions.

Moreover, even if the Board had some legitimate, nondiscriminatory reasons for its decision—which it did not—that would be no defense because discriminatory purposes also motivated its action. Here, the majority's own findings, along with the stipulated and unrebutted evidence that it erroneously failed to consider, show that racial discrimination *was* a factor. Indeed, as Judge Kessler found, the undisputed facts "demonstrate overwhelmingly" that discriminatory purposes "fueled" the Board's decision. App. 63a, 39a.

The court below also incorrectly ruled on a second issue—whether a violation of Section 2 constitutes an independent basis for denying preclearance under Section 5. Because applying the proper legal standard to this case leaves no doubt that the Board acted at least in part based upon discriminatory purposes, the Court need not reach this second issue. If it does reach the issue, however, the legislative history of the Voting Rights Act makes clear that Congress intended a violation of Section 2 to afford an independent basis for denying preclearance. The contrary interpretation offered by the court below would require the Attorney General and the D.C. District Court to preclear voting changes that they

know violate federal law. This Court should not conclude that Congress intended such a result.

ARGUMENT

I. THE BOSSIER PARISH SCHOOL BOARD'S REDISTRICTING PLAN VIOLATES SECTION 5 OF THE VOTING RIGHTS ACT BECAUSE IT WAS ADOPTED WITH A DISCRIMINATORY PURPOSE

The School Board bore the burden of establishing that its redistricting plan "does not have the purpose . . . of denying or abridging the right to vote." 42 U.S.C. § 1973c; *Rome v. United States*, 446 U.S. 156, 183 n.18 (1980) ("Under § 5, the [Board] bears the burden of proving lack of discriminatory purpose. . . ."). As the majority held, if "the evidence is equally convincing on either side, the School Board—bearing the risk of nonpersuasion—must lose." App. 26a (citing *McCain v. Lybrand,* 465 U.S. 236, 257 (1984)). When the entirety of the "extensive record" is considered under this Court's *Arlington Heights* standard, as only Judge Kessler did below, "the evidence is far from being equally convincing on either side." App 38a-39a. Rather, "[t]he evidence in this case demonstrates overwhelmingly that the School Board's decision to adopt the Police Jury redistricting plan was motivated by discriminatory purpose." App. 63a.

The majority reached a contrary decision because it made four errors of law: (1) it refused to consider evidence probative of discriminatory purpose solely because this evidence would also have been probative of a Section 2 violation; (2) it assumed that a nonretrogressive plan could not be adopted with discriminatory purpose; (3) it undertook the burden of explaining away damaging evidence that the Board itself had not explained; and (4) it supposed that so long as some nondiscriminatory reasons for the Board's plan could be identified, other discriminatory reasons could be ignored. All of this is wrong as a matter of law. And all

of it is inconsistent with the hard look this Court has given to a state's alleged justifications for redistricting decisions in *Shaw II*, *Vera* and *Miller*, and to a state's explanation for apparently discriminatory treatment of gay people and women in *Romer v. Evans*, 116 S. Ct. 1620 (1996), and *United States v. Virginia*, Nos. 94-1941 and 94-2107, 1996 WL 345786 (U.S. June 26, 1996).

Yet here, where the discrimination at issue was the kind that historically has received this Court's strictest scrutiny—racial discrimination against black people—the majority below deferred wholesale to the School Board, ignoring critical evidence, creating explanations for damaging testimony by elected officials, and turning a blind eye to what the evidence overwhelmingly showed: The Board acted in part to keep blacks voters from being able to elect their candidates of choice. This Court should not condone such action. The majority's legal errors should be corrected and, when they are, only one legal conclusion is possible: Racial discrimination was present, and preclearance therefore should have been denied.

A. The Majority Erred in Refusing to Consider Evidence of Discriminatory Purpose Under *Arlington Heights* Solely Because That Evidence Also Would Be Relevant in a Section 2 Case

The majority's most serious error was its determination that any evidence relevant to a Section 2 claim could not be used to prove discriminatory purpose under Section 5.[6] This unprecedented and illogical ruling departs from the controlling precedents of this Court.

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[6] App. 24a ("we will not permit section 2 evidence to prove discriminatory purpose under section 5"); *id.* at 23a ("*Miller* forecloses the permitting of section 2 evidence in a section 5 case"); *id.* (refusing to "consider evidence of a section 2 violation as evidence of discriminatory purpose under section 5").

The proper standard for determining the existence of a racially discriminatory purpose in a Section 5 action, as the dissent below recognized, is the constitutional standard set forth in *Arlington Heights*. App. 39a, 61a-62a. In that case, this Court made clear that "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." 429 U.S. at 266. The Court outlined, "without purporting to be exhaustive," relevant factors including:

> (1) "[t]he impact of the official action whether it 'bears more heavily on one race than another,'"
> (2) "[t]he historical background of the decision";
> (3) "[t]he specific sequence of events leading up [to] the challenged decision [including] . . . [d]epartures from the normal procedural sequence";
> (4) "[s]ubstantive departures . . . [from] factors usually considered important"; and
> (5) "administrative history" and other "contemporary statements by members of the decisionmaking body."
> [*Id.* at 266-68 (citations omitted).]

The Attorney General and the Defendant-Intervenors offered unrebutted evidence of discrimination in each of these areas and more, much of it in the form of stipulations. App. 66a-153a (Stip. 1-285). Yet the majority below refused to consider any evidence of the first two *Arlington Heights* factors—the impact of the official action and its historical background—because this evidence also would be relevant in a Section 2 case. This was plainly error under this Court's cases, and it caused the majority to exclude from consideration critical evidence this Court repeatedly has found important in discerning the presence of discrimination.

For example, in *Rogers v. Lodge*, 458 U.S. 613 (1982), this Court held that lower courts must look to "the totality of the relevant facts" to determine whether a challenged action was taken with an unconstitutional

discriminatory purpose. *Id.* at 618. In *Rogers*, this Court, invoking *Arlington Heights*, reaffirmed its conclusion in *Mobile v. Bolden*, 446 U.S. 55 (1980), that the presence of factors set forth in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973), *aff'd sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976), "'may afford some evidence of discriminatory'" vote dilution under the Fourteenth Amendment. *Rogers*, 458 U.S. at 620 (quoting *Bolden*, 446 U.S. at 73). Here, the majority refused even to consider the undisputed evidence with respect to the factors found relevant to a constitutional violation in *Rogers*.[7]

This was clearly wrong under the Court's voting rights decisions. As the Court reiterated just last Term, under Section 5's "purpose" prong a redistricting plan should not be precleared if "'the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution.'" *Shaw II*, 1996 WL 315870, at *7 (quoting *Miller*, 115 S.Ct. at 2492) (other citations omitted).

In *Miller* as well, this Court repeatedly cited the application of *Arlington Heights* to Section 5 voting rights cases, 115 S.Ct. at 2483, 2487, 2489, and expressly acknowledged previous decisions in which the Court conducted or approved a *complete* inquiry into the presence of discriminatory purpose. *See, e.g., City of Pleasant Grove v. United States*, 479 U.S. 462 (1987);

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[7] Thus, the majority disregarded the evidence of the School Board's continuing segregation of students and teachers and its non-responsiveness to its black patrons, in direct contravention of a federal court order. App. 103a-06a (Stip. 111-17). The majority also failed to address undisputed evidence concerning racial bloc voting, App. 122a-27a (Stip. 181-95), the lack of electoral success of blacks, App. 115a-16a (Stip. 153-57), and socioeconomic disparities between whites and blacks, App. 128a-30a (Stip. 198-202, 206-12), all of which were recognized as relevant by this Court in *Rogers*. 458 U.S. at 623-26.

City of Richmond v. United States, 422 U.S. 358 (1975).[8] Even those members of the *Pleasant Grove* Court who dissented from the Court's conclusion that the jurisdiction had acted with a discriminatory purpose recognized that the appropriate standard in the Section 5 context was the intent analysis articulated in *Arlington Heights* and *Washington v. Davis*, 426 U.S. 229 (1976). 479 U.S. at 479 (Powell, J., dissenting).

The majority's rationale for excluding evidence plainly relevant to discriminatory intent under *Arlington Heights* was its view that Section 2 should not be "incorporated" into Section 5, *i.e.*, a violation of Section 2 should not be grounds for denying preclearance under Section 5. App. 23a-24a. But even if this were correct—and we submit it is not (*see infra* pp. 43-45)—it could not justify what the majority has done here.

Obviously, certain kinds of evidence showing voting rights violations would be relevant to both Section 2 *and* Section 5, and the mere fact that evidence of discriminatory purpose under Section 5 could also be relevant to a vote dilution claim under Section 2 can hardly make that evidence inadmissible in a Section 5 claim. It may be doubtful, as this Court recently observed in *Shaw II*, "that a showing of discriminatory effect under § 2, *alone*, could support a claim of discriminatory purpose under § 5," 1996 WL 315870, at *8 n.6 (emphasis added), but this observation merely confirms that such a showing is certainly *relevant* in a Section 5 proceeding.

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[8] This Court also has affirmed other three-judge district court decisions endorsing the application of *Arlington Heights* to Section 5's purpose prong. *See, e.g., Busbee v. Smith*, 549 F. Supp. 494, 516-17 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983); *City of Port Arthur v. United States*, 517 F. Supp. 987, 1019 (D.D.C. 1981), *aff'd*, 459 U.S. 159 (1982).

Not only is there no support whatever in Section 5 itself or in this Court's cases for excluding relevant circumstantial evidence merely because it would also be pertinent to a Section 2 claim, but the majority's approach would threaten to undermine completely enforcement of Section 5's discriminatory purpose prong. This is because the majority's rule would effectively insulate from Section 5 review any discriminatory state purpose not openly acknowledged on the public record. In cases of alleged discrimination against minorities, "[o]rdinarily, *only* circumstantial evidence [of the type disregarded by the majority below] is available to establish [discriminatory] intent." *Diaz v. San Jose Unified Sch. Dist.*, 733 F.2d 660, 662 (9th Cir. 1984) (emphasis added). Indeed, the type of official public statements that provide "direct evidence of the legislature's racial motivations" in racial gerrymandering cases challenging majority-minority districts, *see, e.g., Vera,* 1996 WL 315857, at *6, are unlikely ever to be present in cases of intentional minority vote dilution or racially gerrymandered majority-white districts, because jurisdictions like Bossier are obviously loath to admit publicly such unlawful racial intent.

As a result, excluding all evidence of the discriminatory impact and context of voting changes would, as Judge Kessler recognized, insulate from Section 5 review even "thinly-veiled effort[s] to deny black voters a meaningful opportunity" for participation in the political process. App. 64a. The majority's rule thus would effectively eliminate the discriminatory purpose prong from Section 5. Congress plainly did not intend such a result.

B. The Majority Erred in Concluding That Discriminatory Purpose Cannot Infect a Nonretrogressive Plan

The majority not only refused to consider "Section 2 evidence" in determining discriminatory intent under Section 5, it also held that retrogression is the *only*

discriminatory impact on minority voters that may support an inference of discriminatory purpose. App. 35a, 25a n.13. This too was error and misreads the case upon which the majority relied, *Miller v. Johnson*.

The parties agreed that Bossier's plan was not retrogressive, and, therefore, the proof below focused on discriminatory purpose. As Judge Kessler recognized, under this Court's precedents "an important starting point" in analyzing the government's purpose is the "impact of an official action—whether it 'bears more heavily on one race than another.'" App. 40a (quoting *Arlington Heights*, 429 U.S. at 266 (quoting *Washington v. Davis*, 426 U.S. at 242)). "[A]ctions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose." *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464 (1979).

Miller v. Johnson is not to the contrary. It is true that in *Miller* the Court quoted *Beer v. United States*, 425 U.S. 130 (1976), for the proposition that "'[t]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.'" 115 S. Ct. at 2483 (quoting *Beer*, 425 U.S. at 141). But *Beer* addressed only the meaning of discriminatory *effect* under Section 5.

Moreover, in *Miller* itself, this Court confirmed that purposeful racial discrimination remains an independent basis for a Section 5 objection even to an ameliorative, nonretrogressive plan. *Id.* at 2492. If such a plan can violate Section 5, a plan designed to perpetuate exclusive white control of the electoral process obviously can as well.

Furthermore, in *Shaw II*, this Court again recognized that an "ameliorative" plan could violate Section 5 if it "so discriminates on the basis of race as to violate the

Constitution." 1996 WL 315870, at *7 (quoting *Miller*, 115 S. Ct. at 2492). Indeed, in *Shaw II* the Court analyzed in detail North Carolina's reasons for adopting its first plan, which was not retrogressive, and for rejecting alternative plans. *Id.* at *8. If Section 5 did not reach nonretrogressive changes enacted with a discriminatory purpose, as the majority below suggests, *Shaw II*'s entire discussion of the legislature's purpose in enacting an ameliorative plan would have been unnecessary and irrelevant.

In the end, the majority's view that a nonretrogressive plan cannot be discriminatory ignores reality. Obviously, many covered jurisdictions in this country—like the Bossier Parish School Board—have had no elected black officials at all. And just as obviously, Congress did not mean to insulate such jurisdictions from a discrimination claim under Section 5 simply because they could not "retrogress" from zero. Where, as here, discrimination plays a part in choosing which communities or groups of voters to recognize in the line-drawing process, Congress plainly did not intend—and this Court has never held—that a claim of non-retrogression immunizes such discrimination from Section 5 review.[9] Such a result would transform the Board's "extraordinary success in resisting integration...[into] a shield for further resistance. Nothing could be further from the purposes of the Voting Rights Act." *Pleasant Grove*, 479 U.S. at 472.

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9 *Cf. Barnett v. Daly*, 32 F.3d 1196, 1203 (7th Cir. 1994) (Posner, J.) (refusal on racial grounds to draw lines respecting minority communities "states a claim under the Constitution").

C. The Majority Erred in Providing Its Own Rebuttal to Board-Member Statements Indicating Discriminatory Intent

The majority not only improperly refused to consider critical evidence of discriminatory intent, it also erroneously provided its own speculation and rebuttal as to evidence that it did consider. Although the Attorney General and the Defendant-Intervenors offered statements by Board members directly indicating that they were "hostile" to black representation on the Board, the Board failed to explain these statements. The majority, however, improperly offered its own rebuttal of this evidence.

Specifically, School Board member Henry Burns said that Bossier was "hostile to black representation on the School Board." App. 31a. Bossier offered no evidence explaining this statement. Indeed, the majority acknowledged that the School Board did not even "cross-examine . . . on this point." *Id.* Nevertheless, the majority concluded on its own that Burns did not mean that the Board was hostile to "black representation" but that it merely objected to "drawing of majority-black districts in order to ensure black representation on the Board." *Id.*[10] This is an interpretation entirely of the

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10 As noted above, however, hostility to black-majority districts, where the alternative is unlawful dilution of minority voting strength, may be a prohibited discriminatory intent. *See supra* p. 35 & n.9. As Justice Kennedy recently noted, the Court "would no doubt apply strict scrutiny if [a government body] decreed that certain districts had to be at least 50 percent white." *Vera*, 1996 WL 315857, at *25 (Kennedy, J., concurring). Thus, the majority below set up a false dichotomy in suggesting that admitted opposition to black-majority districts is not even evidence of discriminatory intent "unless section 5 imposes an affirmative obligation to draw majority-black districts." App. 31a. Where a jurisdiction is permitted to draw majority-black districts, *unexplained* "hostility" toward the idea is clearly probative of discriminatory purpose. And, under this Court's recent decisions,

majority's own making, and it is unsupported by any evidence of record.

Likewise, with respect to Thomas Myrick's statement to black leaders that he would not let them take his seat, the majority, again based on no record evidence, attributed this to a "strong desire not to have his district so changed that his constituency is obliterated." *Id.* at 32a. Mr. Myrick testified at the hearing in this case, but he never offered that explanation, and no evidence in the record suggests that making his 46.63% black district, App. 93a (Stip. 82), into a majority-black one would have dramatically altered his constituency.[11]

Our assertion is not that statements such as these necessarily prove discrimination standing alone. Rather our position is that such statements—evidencing hostility to black representation or to the drawing of a majority-minority district—are certainly *evidence* of discrimination, at least in a racially polarized jurisdiction such as this one.

Bossier is plainly at least *permitted* to draw a majority-black district. *Vera*, 1996 WL 315857; *Shaw II*, 1996 WL 315870.

[11] Moreover, the desire not to have his constituency changed is at least evidence of discriminatory intent where, as here, racially polarized voting makes a predominantly white constituency valuable to the white incumbent. *See Perkins v. City of West Helena*, 675 F.2d 201, 214 (8th Cir.), *aff'd*, 459 U.S. 801 (1982) (similar statement by white public official about difficulty of reelection in majority-black district recognized as "direct evidence of discriminatory intent"). *See also Barnett*, 32 F.3d at 1199 (if "in order to protect incumbents . . . the redistricting authority deliberately adopted devices for limiting black representation (. . . because white incumbents were thought particularly vulnerable to challenge. . .), they would be engaged in deliberate racial discrimination") (Posner, J., citing *Ketchum v. Byrne*, 740 F.2d 1398, 1408 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985)); *Garza v. County of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991).

The majority therefore erred in attempting to rebut such statements itself, rather than leaving it to the Board to address them, if it could. The majority in fact, misconstrued "the function of judicial review when it . . . speculate[d] upon what *might have*" been meant by these statements. *N.L.R.B. v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34-35 (1967) (emphasis added). Indeed, as this Court recently reminded in *Shaw II*, "a racial classification cannot withstand strict scrutiny based upon speculation about what '*may have motivated*'" the state actor. 1996 WL 315870, at *6 n.4 (emphasis added).[12]

D. The Majority Erred in Concluding that the Presence of Some Legitimate Reasons for Adopting the Plan Was Sufficient for Preclearance Under Section 5

Not only did the majority ignore relevant evidence and invent its own answers for other evidence, but it also committed one further legal error in assessing discriminatory purpose: Having identified what it considered nondiscriminatory rationales for the Board's action, it failed to consider whether there were also discriminatory reasons for this action. Thus, while the majority itself found that a number of the School Board's purported reasons for adopting its election plan were pretextual, App. 27a n.15, it also concluded that "at

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[12] By inventing nondiscriminatory interpretations of Board members' statements, the majority, like the district court reversed in *Miller v. WLFI Radio Inc.*, 687 F.2d 136 (6th Cir. 1982), deprived the Attorney General and the Defendant-Intervenors of a "fair opportunity" to prove discrimination and misapplied the applicable burden of proof. *Id.* at 139 (citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255-56 (1981)). "In light of the courts' customary reliance on a litigant to select the interpretation of the facts most favorable to his own case, this is a singular result indeed." *Miller v. WFLI Radio Inc.*, 687 F.2d at 138 (vacating and remanding Title VII action where trier of fact invented non-discriminatory rationale for defendant's conduct).

least two of [its alleged reasons] are 'legitimate, nondiscriminatory motives.'" *Id.* at 27a (quoting *New York*, 874 F. Supp. at 400). Although these reasons too were actually pretextual, App. 56a-59a, the majority mistakenly found that they were genuine and erroneously held that this finding was sufficient to support a ruling for the Board.

However, the presence of some legitimate reason for an action is insufficient to establish that it was not unconstitutional under *Arlington Heights*. If a discriminatory purpose was *a* motivating factor in the Board's decision, preclearance must be denied. *See Pleasant Grove*, 479 U.S. at 471-72 (affirming finding of impermissible purpose where plan was motivated "in part" by discrimination).

Here, as noted above, the majority acknowledged that the Board lied about several of its alleged reasons for adopting the plan, App. 27a n.15, but nevertheless credited two: "guaranteed preclearance" and "easy implementation." The dissent effectively exposes these two rationales as "flagrantly pretextual." *Id.* at 56a-59a. But even assuming that these alleged motivations were true, they neither would refute[13] nor, as a matter of law,

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13 At one point, the majority acknowledged that other courts have required that, "[i]n addition [to evidence of legitimate, nondiscriminatory motives], the plaintiff must furnish some affirmative evidence that the proposed changes were not motivated by a discriminatory purpose." App. 27a n.14. Having disregarded most of the evidence that race was a motivating factor for the Board's action, however, the majority simply ignored the lack of evidence from the Board rebutting this proof.

The only shred of evidence that the majority pointed to as countering the overwhelming evidence of discriminatory purpose is the fact that the School Board appointed Jerome Blunt, a black person, to a temporary position on the Board. App. 31a, 34a. But Blunt was appointed to a six-month position in an 89% white district in which, given the racially polarized voting in Bossier

preclude the conclusion that a discriminatory purpose was "a factor" in the Board's decision. *Arlington Heights*, 429 U.S. at 265-66. The majority, however, never applied this governing standard. App. 39a-40a n.2. As a result, it failed to recognize that other compelling evidence of record required denial of preclearance in this case.

E. When the Majority's Errors Are Cured, It Is Plain that the Board's Action Was Motivated in Part By Discriminatory Purpose

When all of the evidence of record is fairly considered and judged under the governing standards, only one legal decision is possible, the one reached by Judge Kessler: the evidence is "overwhelming" that racial discrimination in part "fueled" the Board's decision. App. 39a, 63a. That is the conclusion this Court should reach. And in reaching that conclusion, the Court need not decide that a majority-minority district was *required* in Bossier Parish's redistricting plan. That is not the issue; the issue is whether the School Board adopted the Police Jury plan in part for a discriminatory purpose. The evidence is overwhelming that it did.

Thus, stipulated and unrebutted evidence supports Judge Kessler's uncontested findings, and those findings compel an inference of discriminatory purpose under *Arlington Heights*. The most important of these are that: (1) Bossier is a racially-polarized jurisdiction and, based on that polarization, the Board effectively kept blacks from being elected and kept them from electing

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Parish, he had virtually no chance of election. Furthermore, the Board had an obvious motive for attempting to divert the attention of black voters from the redistricting process. App 54a n.9. In any case, the short-term appointment of a black member to the School Board in and of itself has little relevance to the Board's intention in adopting a long-term plan that plainly disfavored black voters.

candidates of their choice, even though they represent 20.1% of the population and 17.6% of the electorate, App. 40a; (2) Bossier is also a jurisdiction with a long history of discrimination in its schools, App. 42a-46a, and is one that has taken steps to prevent black citizens from influencing policy in those schools, App. 42a, 45a-46a; (3) the Board initially rejected the Police Jury plan, preferring instead to devise a plan of its own, one that might split precincts, App. 47a; (4) nevertheless, after the black community showed that majority-minority districts could properly be drawn, App. 41a, and even after a strong public outcry greeted the proposal to adopt the Police Jury plan, App. 48a-50a, the Board adopted the plan anyway—knowing that it violated many of its own traditional redistricting criteria, App. 50a-51a, and knowing also that the plan would effectively preclude blacks from electing their candidates of choice to the Board, App. 40a-41a; (5) nothing in the public record of the Board's decision indicated any reason for favoring the Police Jury plan, App. 50a; and (6) direct evidence indicated the "hostility" of several Board members toward any majority-black districts. App. 53a-54a.

Moreover, several of the majority's own findings support an inference of discriminatory purpose. Among these additional findings are that: (1) some of the Board's post-hoc rationalizations were "clearly . . . not real reasons" for its decision, App. 27a n.15;[14] (2) the Board considered black voters' concerns about vote dilution as "clouds over the . . . redistricting process" and

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[14] The majority's finding that the School Board proffered shifting justifications for its decision supports a conclusion that the Board acted with a discriminatory purpose. *See, e.g., Southwest Merchandising Corp. v. N.L.R.B.*, 53 F.3d 1334, 1344 (D.C. Cir. 1995); *E.E.O.C. v. Ethan Allen, Inc.*, 44 F.3d 116, 120 (2d Cir. 1994) (citing cases); *cf. St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2749 (1993).

concluded that "[a]ny port will do in a storm," App. 28a;[15] (3) Board member Myrick, who lives in an area that "would likely be included in any majority-black district to be drawn in the northern part of Bossier Parish," App. 81a (Stip. 48), lied about his involvement in the Police Jury's redistricting process, App. 5a, and promoted the Police Jury's plan to preserve his majority-white "constituency." App. 32a.

Finally, viewed in light of the relevant evidence, the two rationalizations for the Board's actions that the majority credited, App. 27a-28a—but which are legally insufficient to justify preclearance, *see supra* I.D.—actually are "*so flagrantly pretextual* as to further corroborate the conclusion that the School Board acted with discriminatory purpose." App. 59a (Kessler, J., dissenting) (emphasis added). Thus, the claimed desire to avoid or to minimize splitting precincts was clearly of little importance to the Board.[16] Likewise, the notion that the Police Jury plan offered "guaranteed preclearance" was plainly disingenuous. *See supra* pp. 22-23.

This Court should not preclear a plan on such a record. Unlike the majority, both the Attorney General and

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[15] These findings confirm that the Board wished to avoid any further dealings with black-voter concerns and to cut short the risk that such voters might be able to elect Board members who would force serious consideration of these issues. This may not reflect racial animosity, but it is racial discrimination nonetheless. App. 143a (Stip. 256) (citing *Garza*, 918 F.2d at 778 n.1 (Kozinski, J., concurring in relevant part)).

[16] As the majority recognized, the Board originally envisioned adopting a plan that split precincts. App. 29a; *id.* at 72a (Stip. 23); J.A 168 (Joiner). Although the Board was "always free to request precinct changes from the Police Jury," *id.* at 72a (Stip. 23), it neither calculated the cost of such changes nor approached "the Police Jury to request precinct changes" before it adopted the Police Jury plan. App. 7a.

Judge Kessler assessed the entirety of this "extensive record" and concluded that it overwhelmingly demonstrated racial discrimination. Judge Kessler's full assessment of the relevant evidence should be sustained.

II. THE BOSSIER PARISH SCHOOL BOARD'S PROPOSED REDISTRICTING PLAN ALSO VIOLATES SECTION 5 BECAUSE ITS IMPLEMENTATION WOULD CONSTITUTE A CLEAR VIOLATION OF SECTION 2

The majority below erred both in ruling that a violation of Section 2 does not constitute an independent basis for denying preclearance under Section 5 and in even reaching the issue in this case. The overwhelming proof of discriminatory purpose under Section 5 made it unnecessary to address the hypothetical question of whether an objection would be proper in a case in which *only* a Section 2 violation is shown. Accordingly, should this Court reverse on the ground that the majority failed to apply the standards set forth in *Arlington Heights* in assessing discriminatory purpose, the Court need not address the question whether preclearance may be denied based solely on a violation of Section 2.

On the other hand, if the Court determines that it should answer this important question in this case, we submit that the Attorney General has a duty under Section 5 to object to a voting change that constitutes a violation of Section 2. *See* Jurisdictional Statement of Janet Reno, *et al.*, at 23-27 (filed March 11, 1996).

When Congress amended the Voting Rights Act in 1982, it extended Section 5 and rejected the rule of *Mobile v. Bolden*, 446 U.S. 55 (1980), that proof of discriminatory purpose was necessary to establish unlawful vote dilution under Section 2. Prior to that time, the Court had interpreted Section 5 to allow denial of preclearance based on a finding of unconstitutional vote dilution. *Beer*, 425 U.S. at 141. Before *Bolden*, however, the constitutional and statutory Section 2

standards were identical—the "results test" of *White v. Regester*, 412 U.S. 755 (1973).[17] Because the standards for unlawful vote dilution under Section 2 and the Constitution diverged as a result of *Bolden* and the 1982 amendments, the question naturally arose whether Congress intended violations of amended Section 2 to remain within the ambit of Section 5.

Congress answered this question and indicated that it still "intended that a section 5 objection also follow if a new voting procedure itself so discriminates as to violate Section 2." S. Rep. No. 417, 97th Cong. 2d Sess. 12 n. 31 (1982). Indeed, just this Term this Court noted that "there has never been any doubt . . . that changes in practices within covered jurisdictions that would be potentially objectionable under § 2 are also covered under § 5." *Morse v. Republican Party of Virginia*, 116 S. Ct. 1186, 1201 (1996) (plurality opinion). *See also id.* at 1236 ("§§ 2 and 5 would appear to be designed to work in tandem") (Thomas, J., dissenting).

A contrary interpretation of the Voting Rights Act, as this case makes clear, would be extremely impractical and would undermine congressional intent; indeed, it would require the Attorney General and the D.C. District Court to preclear plans that they know violate federal law. As this Court pointed out in *Morse*, "[i]f § 5 were narrower than § 2, then a covered jurisdiction would not need to preclear changes in voting practices known to be illegal." *Id.* at 1201.

The lower court's interpretation also would impose substantial burdens on covered jurisdictions like Bossier

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[17] Indeed, the Court in *Beer* not only specifically noted that *White v. Regester* was the then-existing Fourteenth Amendment standard, but suggested that a plan violating that standard would also contravene the "effect" prong of Section 5. *Beer*, 425 U.S. at 142-43 n.14.

and private parties like the Defendant-Intervenors. Indeed, in a case—unlike this one—where unlawful vote dilution was established but the evidence fell short of establishing discriminatory purpose, the covered jurisdiction likely would have to defend a subsequent Section 2 case in which a local federal court would hear much of the same evidence considered in the Section 5 declaratory judgment action in the D.C. District Court. Bossier's stipulation that the court below should decide whether a Section 2 violation existed, App. 144a (Stip. 257), apparently reflects its desire to avoid this gross inefficiency. "It is unlikely that Congress intended such an anomalous result." *Morse*, 116 S. Ct. at 1201 (quoting *Chisom v. Roemer*, 501 U.S. 380, 402 (1991)).

Thus, the system intended by Congress and implemented by the Attorney General is fair and workable. In contrast, the court's ruling below ignores Congress' intent and creates an inefficient system of double litigation that will siphon resources from both the federal courts and local governments. Therefore, the decision below rejecting the Attorney General's long-standing interpretation of Section 5 is incorrect and provides an independent basis for reversing the decision below.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the judgment below.

Respectfully submitted,

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FILED
SEP 17 1996
CLERK

(9) (8)

Nos. 95-1455 & 95-1508

In The

Supreme Court of the United States

October Term, 1995

JANET RENO, ATTORNEY GENERAL
OF THE UNITED STATES,

Appellant, and

GEORGE PRICE, *et al.*,

Appellants,

v.

BOSSIER PARISH SCHOOL BOARD,

Appellee.

On Appeal From The
United States District Court
For The District Of Columbia

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STATEMENT

1. Bossier Parish is located in northwestern Louisiana, and, according to the 1990 Census, has a voting age population that is 17.6% black, and an overall black population of 20.1%. App. 2a.[1] The Parish is governed by a 12-member Police Jury. Although no electoral district of the Police Jury has ever had a majority of black voters, two black candidates have been consistently elected since 1979 to represent a 37.9% black district, and the current incumbent, Jerome Darby, was reelected without opposition in a 26.9% black district (District 7) under the new 1991 plan. App. 85a; App. 2a; J.A. 55-60.

On April 30, 1991, all the members of the Police Jury, including the black member serving on its Reapportionment Committee, approved a plan containing two districts with substantial black populations. App. 3a. Specifically, District Four was 45.2% black, and District Seven was 43.9% black. App. 85a (¶ 59). The plan was submitted to the Justice Department on May 28, 1991, and on July 29, 1991, the Attorney General precleared it. The Police Jury submitted all materials required under the Attorney General's Section 5 guidelines and in no way misled the Department of Justice. 28 C.F.R. §§ 51.53-51.58.

Given that the School Board and the Police Jury had shared the same district boundaries until 1980, the School Board approached the Police Jury to formulate a redistricting plan. App. 4a. The Police Jury rejected this overture. App. 29a. State law expressly prohibited the School Board from changing, splitting, or consolidating the precincts established

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[1] In this brief, citations are to the Appendix ("App.") filed with the jurisdictional statement of Janet Reno, *et al.*, on March 11, 1996, including the numerous stipulations of the parties which are designated herein by reference to the paragraph number; to the Joint Appendix ("J.A.") filed on August 1, 1996; to the transcript of the hearing of the D.C. District Court on April 10 and 11, 1995 ("Tr."); to the exhibits submitted at that time by the appellee ("Plaintiff's Exh."), and the appellant, Janet Reno ("U.S. Exh."); and to the brief of appellant-intervenors ("A-I").

by the Police Jury for the Police Jury's 1991 redistricting plan. J.A. 265a-266a. It was therefore required to use those existing 1991 precincts as redistricting units for its own plan. And as the parties stipulated: "[i]t is impossible to draw, on a precinct level, a black-majority district in Bossier Parish without cutting or splitting existing precinct lines." App. 115a (¶ 152).

Subsequently, George Price, president of the local chapter of the NAACP and an appellant-intervenor in this case, submitted his own plan to the School Board that included two majority-black districts, the maximum possible number of such districts and roughly proportional (2/12) to the Parish's black population. App. 6a. The plan was drawn by William Cooper, of the American Civil Liberties Union, Testimony of W. Cooper at 1, for the exclusive purpose of "creat[ing] two majority black districts," J.A. 260, wholly without regard to precinct boundaries. The NAACP plan subordinates traditional redistricting principles, such as compactness and respect for the political boundaries of towns, the Police Jury districts and precincts. A district court in a related case said of a modified, "improved" version of the NAACP plan, that it "most nearly resembles an octopus as it stretches out to the nooks and crannies of the parish in order to collect enough black voting age population to create not one, but two, majority black districts in Bossier." J.A. 38. Although the Board's plan, like all prior redistricting plans, preserves all town lines outside of Bossier City in the Parish, the NAACP plan splits the boundaries for all three. Plaintiff's Trial Exh. 11 (second, eighth and twelfth pages of the Exhibit).[2]

In direct contravention of Louisiana law, the NAACP plan split 46 precincts, 65 times. Plaintiff's Exh. 11, pp. 1-26; App. 29a. (Some of the precincts suffered more than a single split; thus requiring that they become three or more new precincts.) Of these, 17 precincts would have had less than 20 people in them. Plaintiff's Exh. 11, pp. 1-26. The Parish's district attorney and cartographer advised the Board, at the

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[2] This exhibit has been lodged with the Court.

September 3, 1992 meeting where the NAACP plan was presented that its massive number of precinct splits violated state law, and then it was rejected as a viable redistricting alternative. App. 6a; App. 99a (¶ 102). The School Board shortly thereafter on September 17, 1992, adopted the Police Jury plan that already had been precleared. App. 7a. At the September 3, 1992 meeting, the School Board also responded to NAACP concerns by granting its request that a black be appointed to the vacant seat on the Board. App. 30a.

Although it had precleared the identical Police Jury plan in 1991, and although there was no retrogression of minority voting strength of the School Board plan precleared in the 1980's, the Justice Department objected under Section 5 to the School Board plan on August 30, 1993. The Attorney General found a discriminatory "purpose" because, although "state law prohibits" the NAACP "alternative plan" from legally being adopted, this did not "necessarily" foreclose adoption of the maximization alternative. App. 156a. (School Board "is not free to adopt a plan that unnecessarily limits the opportunity for minority voters. . . . ") (emphasis added).

The NAACP plan's subordination of basic districting principles was done solely in order to replace a plan with two districts having a black population of 44% and 47%, with a plan that had two black majority districts. Yet this creation of such "safe" black districts was wholly unnecessary to provide black voters with a "viable" opportunity to elect their preferred candidates. *There is no competent evidence of racial bloc voting in any local Bossier Parish elections*, and the "foreseeable impact" (and actual result) of the Board's plan was that two black candidates would be elected to the Board. Specifically, the Justice Department's own expert was concededly unable to find *any* racial bloc voting in *any* election for *any* Bossier Parish office, pursuant to either the "extreme case analysis [or] bivariate ecological regression analysis" endorsed by the *Gingles* plurality opinion. *Thornburg v. Gingles*, 478 U.S. 30, 52-53 (1986); J.A. at 115-21. The *only* election where racial bloc voting was found was one "exogenous" *state judicial* race (held not just in Bossier Parish), which obviously reflects different voting patterns than those

for *local representative* office. J.A. 113-15.[3] Even in this single race, the "racial polarization" led to the black candidate receiving 35.7% of the vote in a parish with a 17.6% black voting age population, a difference of 18.1%. J.A. 57.

Moreover, even absent such sophisticated evidence, the raw election results themselves demonstrate that white bloc voting, assuming it exists at all, is not sufficient to "usually" defeat black preferred candidates. *Gingles*, 478 U.S. at 49. Two different black candidates have been consistently elected in a 37.9% (and 27.9% in 1991) black Police Jury district since 1979, a black candidate defeated a white opponent in a run-off in a 25.6% district for the Bossier City Council and black aldermen have been elected in three of the Parish's towns, one of whom was elected at-large in a town (Haughton) with a 30.1% black population. J.A. 55-59. In total, of the 14 "black against white" elections held in Bossier Parish jurisdictions with black populations of between 18% and 43% before the School Board adopted its plan, black candidates who even arguably had black voter support won six, or 43%, of the elections. J.A. 55-59. Of the two School Board races analyzed, the black candidates running against a long-standing white incumbent in a 30.1% black district lost by 59 and 65 votes, respectively, and the United States expert found no statistically significant racial bloc voting in these races. J.A. 57, 59, 116-17; direct Testimony of Jeff Darby at 3; direct Testimony of Johnny Gipson at 2. Since black candidates were elected in districts and towns ranging from 25.6% to 37.9% black populations, two different School Board candidates received approximately 50% of the vote against the white incumbent in a 30.1% black district, and the one "racially polarized" exogenous election provided the black candidate with 18.1% higher vote tally than the black voting age population, it is clear, even without the concessions of the

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[3] *See, e.g., Southern Christian Leadership Conference v. Sessions*, 56 F.3d 1281, 1293 (11th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 704 (1996); *Magnolia Bar Ass'n v. Lee*, 994 F.2d 1143, 1149 (5th Cir.), *cert. denied*, 510 U.S. 994 (1993).

United States voting rights expert, that a plan with two districts with black percentages in the mid-40s would provide black voters with a viable opportunity to elect black candidates of their choice. The Court need not speculate about this, however, because, as the appellant-intervenors admit, when elections *were* held under the Board's "intentionally discriminatory" plan in 1994, two black candidates were elected to the Board, one of them from a 26.7% black district.[4]

Bossier Parish successfully brought a declaratory judgment action in the three-judge District of Columbia court to obtain preclearance under Section 5. The district court rejected the appellants' argument that a Section 2 violation affords grounds for denying preclearance under Section 5.

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[4] Appellant-Intervenors concede that the elections resulted in two black candidates being placed on the School Board, but argue, relying on this Court's denial of the Motion to Supplement the Record, that such "evidence of events that occurred after the Board's decision cannot illuminate its intent at the time it made the decision." Intervenor-Appellants' Br. 6 n.2. *See Reno v. Bossier Parish School Bd.*, ___ U.S. ___, 116 S. Ct. 1540 (1996). This is an odd contention since both appellants relied heavily on 1993 elections and events (the disbanding of the new "bi-racial committee") which occurred "after the Board's decision." However that may be, the most recent elections are relevant to show the absence of any racial bloc voting or potential "results," and to refute the appellants' erroneous assertion that "the School Board adopted a plan 'which *guarantees* that blacks would remain underrepresented on the Board.' " U.S. Br. 19 (quoting App. 41a (quoting *City of Port Arthur v. United States*, 517 F. Supp. 987, 1022 (D.D.C. 1981)) (emphasis added)). Moreover, it is well established that a court may take judicial notice of any fact that is not subject to reasonable dispute and is capable of accurate and ready determination. *See, e.g.*, Fed. R. Evid. 201. Accordingly, appellate courts have routinely taken judicial notice of post-trial elections in voting rights cases given their clear relevance to the proceedings. *See, e.g., Southern Christian Leadership Conference v. Sessions*, 56 F.3d at 1288 n.13; *Westwego Citizens for Better Gov't v. City of Westwego*, 906 F.2d 1042, 1045 (5th Cir. 1990) (noting that "given the long term nature and extreme costs necessarily associated with voting rights cases, it is appropriate to take into account elections occurring subsequent to trial.") (footnote omitted).

App. 11a-12a. In two sentences of its 61-page post-trial brief, the United States (but not the intervenor-appellants) argued that, even if Section 2 is not properly before the court, the court should nevertheless consider and rule upon "*all* the evidence . . . demonstrating how clear the Section 2 violation is." U.S. Post-Trial Br. 36. The court was to engage in this inquiry because, if the court found a Section 2 violation, it could use the "School Board's . . . awareness that the proposed plan might violate Section 2" to conclude that the Board had a "discriminatory purpose in adopting the proposed plan." The district court refused to conduct "full-blown Section 2 litigation" in a Section 5 purpose case and thus refused to consider "evidence relevant *only* to the section 2 violation." App. 23a; App. 9a n.6 (emphasis added). The court then found an absence of discriminatory purpose. Although the district court discounted some of the reasons advanced by the Parish, because they were not the "real reasons," it was "satisfied" that two reasons were, in fact, "legitimate" – "guaranteed preclearance" and "the absence of precinct splits." App. 27a-28a. The dissenting opinion, although agreeing that Section 2 could not be imported into Section 5, disagreed with the lower court's discriminatory purpose analysis, for essentially the reasons outlined by appellants in this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Throughout the 1990's redistricting cycle, the Justice Department extended and distorted its uniquely intrusive Section 5 powers to invalidate ameliorative redistricting plans, if they were chosen in preference to alternative plans that consciously subordinated traditional districting principles for the avowed purpose of maximizing the number of majority-minority districts. The Department has done this principally by finding a failure to adopt the maximizing alternative reflected a racial purpose, even though such alternatives were objectively inferior pursuant to nonracial districting principles, or by invoking Section 2 "results," which the Department interprets to require selection of the maximizing

alternative regardless of its adherence to traditional districting principles. In short, the Department has sought to convert the benchmark for measuring Section 5 "effect" – the preexisting system – into the benchmark for initially assessing Section 2 "result" – the race-conscious maximizing alternative – and found Section 5 violations for failure to adopt the maximizing alternative, either directly by holding that the failure to maximize constitutes a proscribed Section 2 "result," or indirectly by finding that such a "failure" reflects a discriminatory purpose, as supplemented by Section 2 evidence of racial bloc voting and historical discrimination.

In its racial gerrymander cases of the past two Terms, the Court has expressly rejected any such understanding of Section 5 or Section 2, and otherwise prohibited interpreting federal law to require the unconstitutional action of adopting a race-conscious maximization plan that subordinates traditional districting principles. Specifically, the Court has explicitly rejected the notion that a Section 5 "purpose" may be inferred from adopting a plan that more closely adheres to traditional districting principles than the proposed maximizing alternative and rejected the notion that Section 5 preclearance can be premised on a finding that the state's redistricting plan violates Section 2, particularly if the purported Section 2 violation is the failure to adopt a maximizing alternative. Moreover, in keeping with its decision that a Section 2 violation cannot establish Section 5 purpose, this Court has expressly held the Justice Department's "purpose" findings "insupportable," without examining any of the Section 2 evidence concerning racial bloc voting and historical discrimination that the Department urged upon it as relevant to this issue.

Notwithstanding appellants' efforts to wholly distort the opinion below, the district court here articulated and engaged in precisely the same analysis employed in those cases. The court found no proscribed purpose, which is plainly correct because all the Board did here was choose a nonretrogressive plan identical to one that had been precleared by the Justice Department a year earlier and rejected a race-conscious maximizing alternative that is demonstrably inferior with respect

to a host of traditional districting principles, primarily because it split 46 of 56 existing precincts, but also with respect to compactness and maintenance of existing municipal and district boundaries. The court also correctly concluded that, since Congress did not amend Section 5 in 1982 and since the 1982 legislative history also *uniformly* makes clear that Congress *universally* understood that Section 5 prohibits *only* purposeful or retrogressive changes, preclearance cannot be denied to a benign, nonretrogressive change regardless of any unintended Section 2 "result" on minority voters. Having so ruled, the court necessarily also rejected the Justice Department's fall-back argument that it should consider *all* Section 2 evidence, such as racial bloc voting, that is expressly designed to show that rejection of the maximizing alternative has such a "result," but inherently can say nothing about the *reason* for rejecting such alternatives. Although appellants desperately attempt to mislead the Court into believing otherwise, this was the *only* such "Section 2 evidence" rejected by the district court; it manifestly did not reject evidence that was actually probative of the Board's purpose simply because that evidence might also be relevant to a Section 2 inquiry. This is made crystal clear by the court's explicit description of "Section 2 evidence" as that "evidence relevant *only* to the section 2 inquiry" and further confirmed by every statement and citation in the opinion below.

ARGUMENT

I. There Is No Legal Basis For Importing The Results Standard Of Section 2 Into Section 5

Section 5 of the Voting Rights Act imposes a uniquely severe burden on states seeking to operate their electoral systems and enforce their laws. In a reversal of all basic principles of federalism, and all normal presumptions of civil litigation, Section 5 invalidates all otherwise proper local voting laws and practices "unless and until" the submitting jurisdiction proves that it has satisfied the substantive requirements of Section 5 to either a District of Columbia three-judge court or the Attorney

General. Section 5, however, does at least set forth with some specificity the substantive standard that covered jurisdictions must satisfy to lift this burden, and the scope of the declaratory judgments the three-judge court is authorized to issue; *i.e.*, a "declaratory judgment that such [changed voting] qualification . . . does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. . . . " 42 U.S.C. § 1973c. It is well-established that the "effect" prong of the Section 5 reaches only changes causing retrogression in minority voting strength from what existed under the *status quo ante*. *Beer v. United States*, 425 U.S. 130, 141 (1976).

Notwithstanding this plain and unequivocal language, appellants seek to erect yet another obstacle under Section 5 to implementing a voting change: a declaratory judgment that the change does not violate Section 2 of the Act by creating a discriminatory "result." Although the United States does not dispute that Section 5 itself proscribes only voting changes with a discriminatory purpose or retrogressive effect, they argue that the three-judge court (and the Attorney General) nevertheless has the equitable authority – indeed, duty – to enjoin changes free from such defects, but violative of Section 2, because *Beer* and Section 2's legislative history "authorize" such objections. This argument is simply lawless in the most literal sense – it seeks to have the judiciary erect a substantive prohibition on state governments that can be found nowhere in the laws passed by Congress. This Court, of course, is not free to draft its own statutes, and no amount of legislative history or administrative interpretation can so empower it. It is little wonder that the United States' argument has been rejected out of hand by every lower federal court to pass on it[5] and is irreconcilable with this Court's binding precedent.

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[5] *Arizona v. Reno*, 887 F. Supp. 318, 320-21 (D.D.C. 1995); *Georgia v. Reno*, 881 F. Supp. 7, 12 (D.D.C. 1995); *New York v. United States*, 874 F. Supp. 394, 397-98 (D.D.C. 1994); *Burton v. Sheheen*, 793 F. Supp. 1329, 1351-52 (D.S.C. 1992).

1. The short, and complete, answer to appellants' argument is that this Court, in just the past two Terms, has already squarely rejected the notion that a Section 5 objection can be premised on any grounds other than an invidious purpose or retrogressive effect. Indeed, these cases resolve the precise question here by holding that Section 5 affords no basis for objecting to a redistricting plan because it failed to create additional "safe" minority districts, unless that failure was motivated by an invidious purpose. In *Miller v. Johnson*, ___ U.S. ___, 115 S. Ct. 2475 (1995), the United States argued that race-conscious redistricting was warranted to prevent a violation of Section 5. 115 S. Ct. at 2491-92. There, as here, the alleged Section 5 violation was that a political jurisdiction with racially polarized voting and historical discrimination had failed to create a sufficient number of "reasonably" compact majority-minority districts. *Id.* In response, the *Miller* Court squarely rejected this possible Section 5 defense because "[a]meliorative changes, even if they fall short of what might be accomplished in terms of increasing minority representation, cannot be found to violate section 5 unless they so discriminate on the basis of race or color as to violate the Constitution." *Id.* at 2492 (quoting Days, *Section 5 and the Role of the Justice Department*, and B. Grofman & C.P. Davidson, *Controversies in Minority Voting* 56 (1992)). The "State's policy of adhering to other districting principles instead of creating as many majority-minority districts as possible does not support an inference that the plan 'so discriminates on the basis of race or color as to violate the Constitution,' and thus cannot provide *any* basis under § 5 for the Justice Department's objection." *Id.* at 2492 (quoting *Beer*, 425 U.S. at 141) (emphasis added). The Court rejected the Justice Department's contrary interpretation as an "insupportable" expansion of "its authority under the statute beyond what Congress intended" that raised "troubling and difficult constitutional questions." *Miller*, 115 S. Ct. at 2492-93. Accordingly, the *Miller* Court squarely held that a Section 5 objection was warranted only if a redistricting change is retrogressive or has a discriminatory purpose sufficient to violate the Constitution.

The Court reaffirmed this holding just last Term in another case remarkably similar to the instant one, *Shaw v. Hunt*, ___ U.S. ___, 116 S. Ct. 1894 (1996) ("*Shaw II*"). In that case, the district court and Justice Department argued that race-conscious redistricting was appropriate because it was necessary to avoid *both* a Section 2 and a Section 5 violation. This Court again found that the Justice Department's "maximization policy" of requiring an additional black majority district "is not properly grounded in § 5 and the Department's authority thereunder." 116 S. Ct. at 1904. "Here once again we . . . find that creating an additional majority-black district was not required under a correct reading of § 5" because the nonretrogressive redistricting plan did not violate "the purpose prong of § 5" and thus "cannot violate § 5." *Id.* at 1903.

Of particular relevance, in *Shaw II*, the "United States attempt[ed] to distinguish this case from *Miller*" by pointing to the North Carolina State "legislature's determination that it may be susceptible to a § 2 challenge" – an issue that had not been directly addressed in *Miller*. *Shaw II*, 116 S. Ct. at 1904 n.6. The Court rejected this understanding of Section 5 and *Miller* because "we doubt that a showing of discriminatory effect under § 2, alone, could support a claim of discriminatory purpose under § 5." *Id. Accord Bush v. Vera*, ___ U.S. ___, 116 S. Ct. 1941, 1963 (1996) (race-conscious redistricting not justified by "state['s] interest in complying with VRA § 5" because the "State went beyond what was reasonably necessary to avoid retrogression"); *City of Lockhart v. United States*, 460 U.S. 125, 134 (1983) ("Since the new plan did not increase the degree of discrimination against blacks, it was *entitled* to § 5 preclearance.") (emphasis added).

In this case, the United States again seeks to distinguish *Miller* (although not *Shaw II*) on the ground that "*Miller* did not address the issue whether preclearance should be withheld on the basis of a Section 2 violation. . . . " U.S. Br. 43-44. But this is indistinguishable from the argument – squarely rejected in *Shaw* – that a Section 2 "results" violation could justify finding a Section 5 violation. Moreover, even if the Court had not already specifically rejected this particular variation on the United States' consistent "maximization"

theme, it certainly has squarely held that there is not "*any* basis under § 5 for [an] . . . objection" except discriminatory purpose or retrogressive effect. *Miller*, 115 S. Ct. at 2492. *See Shaw II*, 116 S. Ct. at 1904 (voting change "*cannot violate* § 5 unless [there is discriminatory purpose]") (quoting *Miller*, 115 at 2492).

Moreover, the United States defines a "§ 2 violation," as a situation "where racially-polarized voting deprives minority voters of an equal opportunity to elect their chosen candidates, and it is possible to create 'more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of their choice.' " U.S. Br. 44 (quoting *Johnson v. De Grandy*, ___ U.S. ___, 114 S. Ct. 2647, 2655 (1994)). The United States boldly asserts that "*Miller* did not hold that preclearance must be granted in the face of [such a § 2 violation]." *Id.* But, of course, *Miller* did precisely and unequivocally hold that "§ 5 cannot be violated" simply by showing that a racially polarized political jurisdiction did not "create" a "possible" majority-minority district: "In utilizing § 5 to require States to create majority-minority districts wherever possible, the Department of Justice expanded its authority under the Statute beyond what Congress intended and we have upheld." 115 S. Ct. at 2493. To be sure, in *Miller*, as here, the United States specific argument was that the failure to maximize constituted discriminatory purpose, rather than a § 2 discriminatory result. *See* Department of Justice Letter of Aug. 30, 1993, App. 154a, App. 156a-157a. Nevertheless, *Miller* rejected any such maximization policy as "far removed" from any proper (and constitutional) understanding of Section 5. *Id.* at 2493. If it is an unjustified distortion of Section 5 to interpret its *language* as requiring maximization, it is obviously an even greater distortion to require such maximization by importing Section 2 into Section 5, without any basis for doing so in the statutory text. And, as noted, *Shaw II* rejected any such misinterpretation of *Miller's* holding. *See also Shaw II*, 116 S. Ct. at 1904 ("Failure to maximize cannot be the measure of § 2.") (quoting *Johnson*, 114 S. Ct. at 2660).

But even assuming that the lower court's understanding of Section 5's scope is not mandated by "*stare decisis*, especially in such sensitive political contexts as the present," *Vera*, 116 S. Ct. at 1964, it is, as we presently show, certainly required by any rational principle of statutory construction.

2. When Section 2 was amended in 1982 to incorporate the "results" standard, the life of Section 5 was also extended for another 25 years. 42 U.S.C. § 1973b(8). Other than this extension, however, neither the substantive language nor any other provision of Section 5 was amended in any way. As noted, it was well established in 1982, pursuant to this Court's 1976 decision in *Beer*, that Section 5 "effects" reached only changes which caused a retrogression of minority voting strength. *Beer v. United States*, 425 U.S. at 141 ("[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."); *City of Lockhart v. United States*, 460 U.S. at 134 (quoting *Beer*). As the United States correctly notes, it is a well-established canon of statutory construction, particularly for the Voting Rights Act, that congressional reenactment of a statute without change incorporates this Court's prior interpretations of the statute. *United States v. Board of Comm'rs*, 435 U.S. 110, 134 (1978); *Georgia v. United States*, 411 U.S. 526, 533 (1973) ("After extensive deliberations in 1970 on bills to extend the Voting Rights Act, during which the *Allen* case was repeatedly discussed, the Act was extended for five years, without any substantive modification of § 5.")

Moreover, since 1982 this Court has repeatedly recognized that the substantive scope of Section 5 and Section 2 are markedly different, because Section 5 has a much more "limited substantive goal." *Bush v. Vera*, 116 S. Ct. at 1963. *See Holder v. Hall*, ___ U.S. ___, 114 S. Ct. 2581, 2587 (1994) ("[T]he two sections differ in structure, purpose and application."); *Miller*, 115 S. Ct. at 2493 (Section 5's goal is " 'freezing election procedures in the covered areas unless the changes can be shown to be non-discriminatory.' ") (quoting *Beer v. United States*, 425 U.S. at 140). Specifically, the

Court has consistently ruled that "effect" means only "retrogression."[6] Accordingly, it is even clearer now than it was in 1982 that the effect prong of Section 5 invalidates only new voting changes that "increase the degree of discrimination against blacks [or other minorities]." *City of Lockhart*, 460 U.S. at 134. Plainly it does not reach changes that simply fail to *improve* minority voting strength or otherwise embody the "results" standard of Section 2.

Moreover, no language in Section 5 cross-references Section 2, no language anywhere in the Voting Rights Act incorporates Section 2 into Section 5 or otherwise implies that Section 2's substantive standards govern Section 5 determinations. Nor are Section 5 courts granted jurisdiction to address Section 2 challenges. To the contrary, the authority and jurisdiction of the three-judge court in the District of Columbia is strictly limited to issuing a declaratory judgment on whether the voting change has a discriminatory purpose or retrogressive effect. 42 U.S.C. § 1973c.[7] Conversely, the three-judge district court simply has no subject matter jurisdiction over Section 2 claims; that jurisdiction is vested exclusively in the typical "district courts of the United States." 42 U.S.C. § 1971(d). Accordingly, *regardless* of what the legislative history contains, there is no basis for distorting or amending the "plain meaning" of the language enacted into law.[8]

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[6] *Miller*, 115 S. Ct. at 2493; *Shaw II*, 116 S. Ct. at 1904; *Shaw v. Reno*, 509 U.S. 630, 654 (1993). *See also Holder*, 114 S. Ct. at 2587 (opinion of Kennedy, J.) (benchmark for measuring § 5 effect, but not § 2 result, is the "existing voting practice"); *id.* at 2589 (O'Connor, J., concurring) (same); *City of Lockhart*, 460 U.S. at 134 (The aim of "Section 5 was to prohibit only retrogressive changes.").

[7] *City of Lockhart*, 460 U.S. at 129 n.3. (Under Section 5, the issues to be decided by a three-judge court are strictly limited.); *Allen v. State Bd. of Elections*, 393 U.S. 544, 561-62 (1969).

[8] "Legislative history is irrelevant to the interpretation of an unambiguous statute." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 808 n.3 (1989). *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158, 172 (1989); *Burlington N. R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987); *Garcia v. United States*, 469 U.S. 70, 76 n.3 (1984);

We nevertheless note that the legislative history *uniformly* reflects a universal understanding that the language of Section 5 prohibits only changes with a discriminatory purpose or retrogressive effect. First, every expression of congressional intent confirms that Congress understood that it was simply "extend[ing] the *present* coverage" of Section 5. S. Rep. No. 417, 97th Cong., 2d Sess. 2 (1982) ("S. Rep.") (emphasis added). *See id.* at 7 ("Congress has decided to retain Section 5."). *See also* H.R. Rep. No. 227, 97th Cong., 1st Sess. 1 (objective of 1982 Act is "to extend continuously [Section 5]") (1981) ("House Rep."). Indeed, as the commentators have noted, not one witness at the Senate or House Subcommittee Hearings in 1982 discussed changing Section 5 or otherwise suggested that changes to Section 5's preclearance standard were needed.[9] Even the two representatives who *desired* that a Section 5 objection be premised on a Section 2 violation clearly stated their understanding that the "effect" prong of Section 5 reached only "retrogression" and that it differed from Section 2 "results."[10] The legislative history otherwise confirms congressional awareness of the

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Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 119 (1980); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992); *Patterson v. Shuman*, 504 U.S. 753, 760 (1992).

[9] *See* A. Thernstrom, *Whose Votes Count?* 300-01 n.10 (1987); Boyd & Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 Wash. & Lee L. Rev. 1347, 1420-21 n.365 (1983). *Voting Rights Act: Hearings Before the Subcommittee on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 79-80 (1982).

[10] Senator Kennedy: "As mentioned in this report, *the section 2 standard is not the same as the section 5 standard.* This means not only that section 2 is governed by the totality of the circumstances factors, but it also means that the retrogression requirement of *Beer* against United States does not apply to section 2 cases – although of course, such a retrogression would be relevant evidence in section 2 case." 128 Cong. Rec. 7,095 (1982) (emphasis added). 128 Cong. Rec. 3,841 (statement of Representative Sensenbrenner) (same).

obvious differences between the Section 2 "results" standard and the Section 5 "effects" standard.[11]

Thus, even assuming a statute can be amended while its language remains wholly unaltered, Congress' deliberate and conscious preservation of an existing preclearance process that unequivocally did not reach nonretrogressive discriminatory results is irreconcilable with the conclusion that the 1982 Amendments were intended to inject such a results standard into the Section 5 preclearance process. This truism was made explicit in colloquies between one of the principal sponsors of the Act, Representative Edwards, and two of his colleagues, after the Senate Report had been written.[12] Accordingly, under any theory of statutory interpretation, there is no basis for interpreting Section 5 to reach Section 2 results.[13]

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[11] 2 Senate Hearings 80 (Sen. Dole) ("The Section 5 effects test is different from the results test of *White v. Regester*."); S. Rep. at 68; 128 Cong. Rec. S6930-31 (daily ed. June 17, 1982) (remarks of Sen. DeConcini); 1 Senate Hearings 89 (Attorney General Smith); 1 Senate Hearings 671 (Sen. Hatch); 1 Senate Hearings 1689 (W. B. Reynolds).

[12] Mr. LEVITAS. . . . I . . . inquire of the gentlemen from California whether there is *any portion of this legislation that changes section 5 of the act, of the Voting Rights Act, or changes the tests contained therein. Does it or does it not affect section 5?*

Mr. EDWARDS of California. If the gentleman will yield, I believe the gentleman is referring to pre-clearance, section 5.

Mr. LEVITAS. That is right.

Mr. EDWARDS of California. *No change was made.*

Mr. FOWLER. . . . *[I]s it true that the proposed amendments sent over by the other body [Senate] do not change in any way section 4 of the current Voting Rights Act?*

Mr. EDWARDS of California. *That is correct; the preclearance provisions are not changed.*

128 Cong. Rec. 14,938 (1982) (emphasis in original).

[13] *See Chisom v. Roemer*, 501 U.S. 380, 396 (1991) ("[W]e are convinced that if Congress had such an intent, Congress would have made it explicit in the statute, or at least some of the Members would have

Incredibly, neither appellant takes issue with *any* of the foregoing. Neither appellant seriously argues that the effects (or purpose) prong of Section 5 can be interpreted to prohibit (benign) nonretrogressive changes. They do not seek to have this Court overturn its consistent holdings, before and after 1982, that "effect" means only "retrogression." They do not and cannot cite any legislative history or any administrative interpretations suggesting that Section 5's "effect" or "purpose" invalidate an "ameliorative" change because of a proscribed Section 2 "result."[14]

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identified or mentioned it at some point in the unusually extensive legislative history of the 1982 amendment."); *Holder*, 114 S. Ct. at 2629 (Stevens, J. dissenting) ("When a statute has been authoritatively, repeatedly, and consistently construed for more than a quarter century, and when Congress has reenacted and extended the statute several times with full awareness of that construction, judges have an especially clear obligation to obey settled law.").

[14] According to the United States, a statement in the House Committee Report articulating the rationale for *amending Section 2* to remove the "purpose" requirement, indicates that a Section 2 violation should result in the denial of preclearance under Section 5. U.S. Br. 38 (quoting House Rep.). Even when taken out of context, however, that passage does not say anything about Section 5, about Section 5 courts or about those courts' ability to entertain Section 2 claims. Of course, if the passage *did* say that Congress was amending Section 2 to make its prohibitions coextensive with Section 5, then Section 2 would prohibit only "retrogression." We doubt the United States would accept this result, even though they elsewhere insist that it would be "anomalous" for Section 5 and Section 2 to have different standards. When restored to its context, the quoted passage simply advances the primary rationale for why Congress should overturn *Mobile v. Bolden*, 446 U.S. 55 (1980) and adopt a non-"purpose" standard for Section 2, as the immediately following paragraphs make clear. *See, e.g.*, House Rep. at 29 ("applying a 'purpose' standard under Section 2 while applying a 'purpose or effect' standard under the other sections of the Act would frustrate the basic policies of the Act."). But this does not suggest that the non-"intent" standard adopted for Section 2 would be identical to the Section 5 "effect" standard and, much more important, there is absolutely no suggestion that Congress was modifying in any way the Section 5 "effect" standard to track Section 2. In this regard,

Rather, they make the astonishing argument that a change can be denied preclearance under Section 5 *even if it satisfies Section 5*. In support of this *non sequitur*, they point to legislative history and administrative interpretations which, they claim, "authorize" Section 5 objections for actions which Section 5 does not prohibit, but Section 2 does. While we deal with the specifics of those arguments below, the dispositive, and seemingly obvious, point is that a court cannot object under Section 5 unless it can interpret *Section 5* to prohibit the proposed voting change.

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the most that can be gleaned from the House Report is that Congress thought that there would be gap in the Voting Rights Act's protections if Section 5 imposed a *more difficult* legal standard on states that Section 2 imposes. If that were the case, then discriminatory voting procedures would be illegal only if they were changed and triggered Section 5 coverage, but precisely the same practices would be immune from Section 5 or Section 2 challenge if they were "either [unchanged since] 1965 or because they arise in jurisdictions not covered by Section 5." *Id.* at 28. *Cf. Chisom v. Roemer*, 501 U.S. at 401. But there is no such gap if Section 5 imposes a *less onerous* standard than Section 2, because voting procedures which satisfy Section 5 can nonetheless be challenged under the generally applicable Section 2. Finally, as this Court has already carefully described, the House Report was describing a predecessor version of the Section 2 law rather than that ultimately enacted, which contained only a subsection (a) simply "provid[ing] that proof of discriminatory intent is no longer necessary." *Chisom*, 501 U.S. at 395. It was only in the Senate, after "Senator Robert Dole's compromise," that a subsection (b) was added to "provide guidance about how the results test is to be applied." *Id.* at 399 n.26, 395. As Senator Dole made clear, "an added benefit of the compromise is that it makes clear that the *White* approach should apply by directly codifying language from that decision in Section 2," which helped because the "House report . . . was ambiguous as to whether to the *White* test or the Section 5 effects test should apply." 2 Senate Hearings 80. Again, while there may have been ambiguity about how closely the new Section 2 results test would follow the existing Section 5 effects standard, no one suggested that the Section 5 standard was being modified or expanded to encompass Section 2 results. As noted, this point was made explicit by the Edwards-Levitas colloquy when the Senate Bill, with the new subsection (b), was returned to the House.

If no federal law invalidates Bossier Parish's redistricting system, there is simply no bar to enforcing this ordinance and holding elections under it. And if the three-judge court finds that the redistricting plan is free from invidious purpose and retrogression, the preemptive constraints of Section 5 have been lifted and no federal law trumps the Board's plan. If the three-judge court decides to also issue an advisory opinion on Section 2, this can be of no legal consequence because nothing in the Voting Rights Act makes such a Section 2 determination a prerequisite to implementing a jurisdiction's voting changes and, in any event, the three-judge court has no subject matter jurisdiction to rule on any Section 2 violation. Accordingly, even if every Member of Congress clearly said they *wanted* the three-judge court to deny preclearance to laws that satisfied Section 5's substantive precepts, there is simply no law which would provide the court with the authority to do so and, indeed, any such action would be entirely contrary to the statutory language Congress did enact.[15]

3. According to the Solicitor General, a Congress which engaged in one of its most extensive and divisive debates over whether Section 2 should be amended to incorporate the ambiguous "results" test, nonetheless "intended" to broadly expand the substantive scope of Section 5 beyond the "retrogression" standard in *Beer* by incorporating the controversial "results" standard into the Section 5 preclearance process. Congress manifested this "intent," albeit unaccompanied by any statutory amendment *implementing* that intent, in two ways.

First, Congress conveyed its understanding that *Beer*, of all cases, had *already* "authorized" Section 5 objections for

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[15] Two Justices in *Morse v. Republican Party of Va.*, ___ U.S. ___, 116 S. Ct. 1186, 1201 (1996) (Opinion of Stevens, J.) opined that any voting "practices and procedures [that] fall within the scope of § 2, . . . must also be subject to Section 5." Of course, the question of whether "for threshold coverage, §§ 2 and 5 have parallel scope" is an entirely separate issue from whether the substantive legality of those procedures need be adjudged by the same standards. *Holder*, 114 S. Ct. at 2589 (O'Connor, J., concurring).

violations of the *White v. Regester*, 412 U.S. 755 (1973), "results standard" embodied in Section 2. *See* U.S. Br. 37-38. *Beer* purportedly authorized Section 5 "results" objections in the following sentence: "[A]n *ameliorative* new legislative apportionment *cannot violate § 5* unless the new apportionment itself so discriminates on the basis of race or color as to violate the *Constitution*." *Beer*, 425 U.S. at 141 (emphasis added). Perhaps realizing that this sentence did not clearly convey that ameliorative redistricting plans were *impermissible* if they had a negative "*result*," Justice Stewart eliminated any ambiguity by citing *White v. Regester* at the end of a string cite in a footnote explaining, in *dicta*, why the plaintiffs "could [not] rationally" argue that a Louisiana redistricting plan's failure to create compact black-majority districts "remotely approach[ed]" establishing a constitutional violation. *Id.* at 142 n.14. One sentence in a 1982 Senate Report footnote stated that *Beer* held that an ameliorative change "is *not* objectionable" unless the "change 'itself so discriminates *on the basis of race* or color as to violate the *Constitution*,' " thus somehow suggesting that Section 5 authorized a "results" objection under *Beer*. S. Rep. 12 n.31 (1982) (quoting *Beer*, 425 U.S. at 141) (emphasis added).

This is not a remotely plausible interpretation of *Beer* or the sentence citing it in the Senate Report footnote. *Beer*'s explicit holding and rationale was that Section 5 "effect" reached only retrogressive changes and therefore did not, contrary to the holding of the lower court and the reasoning of Justice Marshall's vigorous dissent, reach *White v. Regester* results. *See Beer*, 425 U.S. at 157-63 (Marshall, J., dissenting). The sentence in *Beer* cited by the United States does not reverse that holding, but simply makes the obvious point that intentionally discriminatory action is prohibited by Section 5. Actions taken "*on the basis of race*" are purposefully discriminatory and the Constitution only forbids purposeful discrimination. *Washington v. Davis*, 426 U.S. 229, 239-41 (1976). Moreover, the *Beer* court stated that such unconstitutional discrimination would "violate *§ 5*." *Id.* at 141 (emphasis

added). And, after *Beer* established the retrogression standard, the only way an ameliorative voting change could violate Section 5 would be if it was motivated by the discriminatory "purpose" outlawed by that statute.

More to the point, even if Justice Stewart (the author of *Bolden)* was confused about whether the Constitution reached unintentional discrimination in 1976, Congress well understood in 1982 that the Constitution embraced the purpose standard in voting cases and elsewhere. The whole point of amending Section 2 was, of course, to establish a statutory "results" test that was different from the "exceedingly difficult" and "subjective" purpose standard that *Washington v. Davis* and *Bolden* had established for the Constitution. *See Thornburg v. Gingles*, 478 U.S. at 35, 71-74; S. Rep. at 28. Thus, in 1982, it was impossible to have understood *Beer*'s reference to the constitutional standard, or the Senate Report's quotation of that reference, as denoting anything other than the purpose test enunciated in *Bolden* and *Davis*, which differed so markedly from the *White v. Regester* "results" showing. Even if this were at all ambiguous, the *Senate Report itself* states as clearly as possible that Congress was *deliberately differentiating* the *White* "results" standard of Section 2 from the Section 5 "effects" standard.[16] Thus, *no one* thought that "purpose" meant "results"; no one thought "effect" meant anything other than retrogression and no one thought *Beer* held that "purpose" or "effect" meant "results."

To be sure, the Committee staffers who authored the Senate Report then went on to express their desire that the Attorney General (and perhaps three-judge Section 5 courts) object not only to laws which violate the substantive scope of Section 5, but "also" to those that "violate Section 2." S. Rep. at 12 n.31. But the relevant point is that neither this sentence, nor any other in the legislative history, purports to suggest

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[16] "By referring to the 'results' of a challenged practice and by explicitly codifying the *White* standard, the amendment distinguishes the standard for proving a violation under Section 2 from the standard for determining whether a proposed change has a discriminatory 'effect' under Section 5 of the Act." S. Rep. at 68.

that *Section 5* outlawed the "results" proscribed by Section 2. To the contrary, if Section 5's substantive requirements did mirror those of Section 2, then there could be no such thing as a change which satisfied Section 5 but nonetheless violated Section 2. That being so, the desires expressed in the Senate Report concerning how Section 5 was to be enforced are meaningless – it is neither law nor even legislative history. "[U]nenacted approvals, beliefs, and desires are not laws." *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988). As in *Isla Petroleum*, "[t]here is no text here . . . to which expressions of . . . intent in legislative history might attach." *Id.* at 501.[17] The only purpose of legislative history is to illuminate the meaning of ambiguous statutory language, and the Senate Report does not purport to relate to any statutory language, even assuming there was some ambiguity in Section 5.

For essentially the same reason, the fact that the Justice Department has issued administrative guidelines saying the Attorney General will enter a Section 5 objection when "necessary to prevent a clear violation of amended section 2" is of no consequence. 28 C.F.R. § 51.55(b)(2). Assuming *arguendo* that the Attorney General's interpretation of the Voting Rights Act is entitled to any deference in these circumstances,[18] the

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[17] Even if the Senate Report did purport to interpret the meaning of Section 5, it could not affect the construction of that provision because Section 5's language was not changed in 1982. In *Pierce v. Underwood*, 487 U.S. 552, 567 (1988), this Court held that a Committee Report setting forth a very definite view of a 1980 civil rights attorneys' fee statute, at the time the statute was reenacted in 1985 without change to its language, was irrelevant to interpreting the statute's meaning because, "[q]uite obviously, reenacting precisely the same language would be a strange way to make a change."

[18] As the district court correctly noted, such deference is not appropriate given that an action seeking preclearance may be brought in court in the first instance. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 203 (1991). Furthermore, the Department's guidelines are just that and are not entitled to the deference afforded regulations. *See, e.g., General Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976); *Ansonia Bd. of Educ. v.*

relevant guidelines do not purport to "interpret" anything in the Voting Rights Act or Section 5. Rather, in stark contrast to the argument the Justice Department advances in this Court, its guidelines clearly state that a "change affecting voting is considered to have a discriminatory effect under Section 5 if it will lead to a retrogression in the position of members of a racial or language minority group. . . . " 28 C.F.R. § 51.54(a). Thus, the Justice Department concedes that effect encompasses only retrogression, but not Section 2's "result." The guidelines then go on to simply announce that even if a change satisfies Section 5, the Department will withhold preclearance if the change clearly violates Section 2. 28 C.F.R. § 51.55(b)(2). Thus, the guidelines nowhere contend that Section 5 reaches changes with discriminatory results, but quite candidly acknowledge that they must rely on Section 2 to invalidate such nonretrogressive changes. Since the Court will not defer to an agency interpretation of *unambiguous* statutory language, it obviously cannot defer to agency policies that concededly rest on no statutory language.[19] *See*

Philbrook, 479 U.S. 60, 69 n.6 (1986) (noting that administrative "guidelines are properly accorded less weight than administrative regulations declared by Congress to have the force of law."). More important, as in *Miller*, deference should not be accorded the Department's interpretation given the serious constitutional concerns it raises. 115 S. Ct. at 2491 (citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574-75 (1988)). *See also National Labor Relations Bd. v. Catholic Bishop*, 440 U.S. 490 (1979). Not only is the Equal Protection Clause implicated by the Department's maximization policy, but also this expansion of Section 5 would cause serious concerns under the Tenth Amendment and federalism principles given the additional burdens on States. *Miller*, 115 S. Ct. at 2493.

[19] Perhaps the United States' silliest argument is that this Court should give weight to the fact that a House Subcommittee in *1987* "endorsed" an Attorney General's Guideline that resembled the Justice Department's current guideline on the interaction of Section 2 and Section 5. U.S. Br. 40-41. The fact that a handful of Representatives from a different Congress, who were not amending the Voting Rights Act, viewed favorably an Executive Branch enforcement policy says nothing about

Presley v. Etowah County Comm'n, 502 U.S. 491, 509 (1992) (refusing deference to the Attorney General because Section 5 "unambiguous[ly]" does not cover changes to decisionmaking authority).

Moreover, it is a cardinal "rule of statutory construction that if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.' " *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989). *See New York v. United States*, 505 U.S. 144, 171 (1992); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7 (1989); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984). The United States' attempt to increase Section 5's burden on the states emphatically flunks this stringent test since there is no "language of the statute" suggesting that Section 2 is incorporated into Section 5, much less unmistakably clear language to this effect.[20]

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congressional intent five years earlier. *Blanchette v. Connecticut Gen. Ins. Corp.*, 419 U.S. 102, 132 (1974); *Pierce*, 487 U.S. at 566 ("[I]t is the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means.") If we are wrong in this, however, we respectfully submit that the Court is obliged to solicit the views of the *current* House Subcommittee on Civil and Constitutional Rights, who are entitled to similar deference and might well have a very different view of the Justice Department's Section 2 and "maximization" policies.

[20] Abandoning any pretense that their argument is supported by any federal law, the United States makes the shocking suggestion that, *even if the Voting Rights Act does not authorize any such objection*, Section 5 courts may, in the exercise of their "equitable discretion," enjoin state law practices merely because they offend the Court's view of the "public interest." U.S. Br. 34-35. While district courts exercising the equitable authority granted by 28 U.S.C. § 2201 obviously "may," pursuant to virtually unreviewable "discretion," *refuse to adjudicate* declaratory judgment actions brought before them, this plainly has no application to the duties of courts exercising the extraordinary and unique powers under *Section 5*. As the correlative responsibility of the Attorney General reflects,

We note finally that the appellants determined twisting of Section 5 is wholly unnecessary to protect any voting rights of minorities guaranteed by the 1982 Voting Rights Act. Obviously, if any jurisdiction violates any Section 2 rights, much less commits a "clear" violation, the Justice Department and private intervenors can promptly bring a Section 2 lawsuit to swiftly end any such deprivation.[21] Here, the Board's

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Section 5 courts are not *permitted* to issue a declaratory judgment under Section *2201*, they *must* "expeditious[ly]," *Morris v. Gressette*, 432 U.S. 491, 504 (1977), issue such a declaratory judgment under the duties imposed by *42 U.S.C. 1973c*, because submitting jurisdictions are "*entitled* to preclearance," *Lockhart*, 460 U.S. at 134, to relieve the *temporary* "suspen[sion of] new voting regulations pending scrutiny by federal authorities," *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966), *unless* the court finds that the change has the prescribed "purpose or effect." *Cf.* 42 U.S.C. § 1973c (Attorney General has 60 days to object). If the Section 5 courts truly did enjoy the discretion granted by § 2201, they could permissibly refuse to relieve Section 5's preemption of state laws for virtually any reason, including "inconvenience," even if the changes plainly did not violate either Section 5 *or* Section 2. 10A Wright & Miller, *Federal Practice and Procedure* § 2759. Needless to say, this would be blatantly unconstitutional. *South Carolina v. Katzenbach*, 383 U.S. at 335-36. But even if the specious analogy to Section 2201 is accepted, the United States argument is still unavailing because § 2201 only authorizes district courts to *refrain from resolving* the potential controversy and thus maintaining the *status quo* where the presumptively valid state law remains in effect. It obviously does not empower district courts to *issue* a declaratory judgment that the state law satisfies the federal commands with which it allegedly conflicts, but then nonetheless enjoin the state law because it allegedly offends another law over which the court has no jurisdiction, in order to serve the "public interest." Yet the Justice Department seeks just such an expansion of Section 5 courts' substantive powers (and necessarily, then, its *own* power) by arguing that a court may declare compliance with Section 5's purpose and effect, but then enjoin the practice due to a perceived Section 2 violation, all in the name of the Court's inherent "discretion" to vindicate the public interest.

[21] In this regard, the United States suggests that it would be "anomalous" if courts resolving Section 5 questions could not also adjudicate Section 2 disputes. But any such "anomaly" is, of course,

redistricting plan plainly did *not* violate Section 2 because there was no "reasonable alternative" benchmark plan that was either "compact" or did not subordinate traditional districting principles. *Holder*, 114 S. Ct. at 2589 (O'Connor, J., concurring); *Gingles*, 478 U.S. at 50. More important, as shown above (*infra* p. 3-5), appellants would be utterly unable to prove any racial bloc voting by white or black citizens in *local* Bossier Parish elections and the *one* "exogenous" *state judicial* race (held not just in Bossier Parish), where racial bloc voting was found, obviously cannot show that whites "usually" defeat black-preferred candidates. *Gingles*, 478 U.S. at 51. Thus, the Justice Department could never have mounted a successful Section 2 suit, particularly since the Fifth Circuit uses a more stringent test for bloc voting than the *Gingles* plurality, which is precisely why the Department has never challenged the Police Jury plan *identical* to the "intentionally discriminatory" School Board plan that so "clearly" violates Section 2. *See, e.g., League of United Latin Amer. Citizens v. Clements*, 999 F.2d 831,

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inherent in the fact that, as this Court has repeatedly confirmed, the two statutes have different substantive standards. (*See infra* p. 13) The entities covered by Section 2 and Section 5 are different, the burdens of proof are different, the benchmarks for measuring racial impact are necessarily different, the courts which adjudicate such disputes are different, the triggering mechanisms ("change") for coverage are different, and most important, Section 5 imposes unique burdens on sovereign state governments. Therefore, it would be quite "anomalous" indeed if Section 5 did *not* have a more "limited substantive goal" than the generally applicable Section 2. *Vera*, 116 S. Ct. at 1963. Moreover, it is only by *accepting* appellants' argument that this Court would authorize "relitigation" and potentially conflicting judgments. *See* U.S. Br. 24. If a Section 5 court were, after a full trial, to affirmatively find *no* Section 2 violation and grant preclearance, the jurisdiction would have no *res judicata* defense to a subsequent Section 2 suit because Section 5 clearly states that neither the Attorney General's preclearance "nor a declaratory judgment entered under this section shall bar subsequent action to enjoin enforcement of [the voting change]." 42 U.S.C. § 1973c.

850-55 (5th Cir. 1993) (requiring consideration of *nonracial causes* of racial bloc voting).[22]

II. The Court Below Considered All Evidence Relevant To Section 5 Purpose And Only Rejected Evidence Relevant Solely To Section 2

The district court opinion clearly states, "[b]ecause we hold . . . that section 2 of the Voting Rights Act . . . has no place in this section 5 action, much of the evidence relevant *only* to the section 2 inquiry is not discussed in this opinion." App. 9a n.6 (emphasis added). So far as we can discern, appellants do not maintain that this constituted legal error if Section 2 was not properly before the court below. Neither appellant argues in this Court that *all* evidence relevant to establishing a Section 2 "results" violation is relevant to the Section 5 purpose inquiry, nor do they advance the *non*

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[22] Appellant's Procrustean attempt to force Section 2 litigation into the Section 5 proceeding is also wholly unworkable because of the two statutes' differing evidentiary burdens. And even if this Court were inclined to rewrite Section 5's plain requirements and place the Section 2 burden on the United States, this would merely complicate the submitting jurisdiction's task because they would have to *await* the United States' discovery and presentation of complex evidence concerning racial bloc voting, and all the voluminous "Senate Report factors" before it could "rebut" this enormous evidentiary showing. *See Gingles*, 478 U.S. at 44-45 (listing "nonexclusive" Senate Report factors and "stress[ing]" that "other factors may also be relevant."). Moreover, the three-judge court "must" examine *all* such "evidence in the totality of circumstances," because Section 2 violations were "intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts." *Johnson*, 114 S. Ct. at 2657. Consequently, the extraordinary confusion and delay engendered by injecting Section 2 issues into Section 5 cases would, as a practical matter, preclude any jurisdiction from seeking preclearance from the Section 5 courts, since timely resolution is essential under Section 5, particularly in the redistricting context. This is, of course, the Justice Department's intended result, since it would then become the sole practicable gateway for all Section 5 submissions and would have to "prove" a Section 2 violation only to *itself*.

sequitur that the court should have considered that subset of Section 2 evidence that is "irrelevant" to Section 5 purpose.

Consequently, in order to manufacture a "legal error" in this straightforward "clearly erroneous" case, appellants distort beyond recognition the legal principle actually announced by the district court and devote the bulk of their briefs to attacking the straw man thus created. Specifically, they argue that *some* evidence is relevant to both Section 2 and Section 5 violations and that the court below excluded probative Section 5 purpose evidence solely because it was also relevant to establishing a Section 2 violation. Appellants provide two examples of evidence which was allegedly so excluded: the racial impact of the Bossier Parish's redistricting plan and the official history of racial discrimination in Louisiana.

While we certainly agree that courts – in Section 5 proceedings or elsewhere – should not exclude evidence probative of the legal question being resolved simply because it is also relevant to another legal issue, the district court did not in word or deed so exclude any such evidence probative of the Section 5 purpose inquiry because it also shed light on the Section 2 question. Any suggestion that the court did reject evidence relevant to *both* Section 2 and Section 5 is, of course, irreconcilable with the court's plain statement that it was not considering "evidence relevant *only* to the Section 2 inquiry." App. 9a n.6 (emphasis added). Moreover, in applying this standard, the court did consider the impact of the Board's redistricting plan and, indeed, devoted most of its opinion to explaining why that alleged impact did not reflect the racially discriminatory purpose. To be sure, the court below did not yet again recite the familiar litany of the Louisiana state legislature's shameful prior discrimination against black voters, for the very good reason that this history sheds absolutely no light on the Bossier Parish School Board's purpose in adopting its redistricting plan. Indeed, the court below's method of analyzing the Section 5 discriminatory purpose issue mirrors precisely the analysis employed by this Court to resolve the same issue in *Miller* and *Shaw II*.

1. In *Miller*, as here, the Justice Department strenuously argued that its Section 5 "purpose" objection to the

initial Georgia redistricting plan was well-founded because there was a "history of discrimination in voting" continuing "into the 1980's," as well as substantial "racial bloc voting" and the fact that "black candidates had in the past virtually never been successful." Brief of United States filed in *Miller v. Johnson*, at 32-33. As here, the Justice Department argued that such evidence was probative under *Rogers v. Lodge*, 458 U.S. 613 (1982) and the *Arlington Heights* factors for "racial impact" and the "historical background of the decision." *Id.* *See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266-67 (1977). As noted, without any reference or inquiry into these factors, the Court found the Justice Department had "no reasonable basis" to infer a discriminatory purpose. *Miller*, 115 S. Ct. 2492. Rather, the Court found no such purpose solely on the grounds that the district court had "accepted" the Attorney General's "detailed explanation [that] the initial decision not to enact the max-black plan" was due to its "policy of adhering to other districting principles." *Id.* Similarly, in *Shaw II*, the Court found the Justice Department's "purpose" argument "insupportable" because North Carolina initially rejected the "second minority district" in order "*to keep precincts whole*, to avoid dividing counties into more than two districts . . . " and other neutral redistricting principles. 116 S. Ct. at 1904 (emphasis added). Again, in reaching this determination, the Court viewed as irrelevant North Carolina's well-documented history of racial discrimination and racially polarized voting. *See, e.g., Gingles*, 478 U.S. at 38, 59.

Thus, in both cases, this Court resolved the Section 5 purpose inquiry solely by determining whether there were legitimate and credible reasons for rejecting the plan with the additional minority district and eschewed as irrelevant the Section 2 evidence concerning prior voting discrimination and racial bloc voting. As noted, the *Shaw II* opinion also explicitly expressed its disagreement with the notion "that a showing of discriminatory effect under § 2, alone, could support a claim of discriminatory purpose under § 5." 116 S. Ct. at 1904 n.6. Since this is precisely the analysis articulated and followed by the district court (albeit in far greater detail),

it is impossible to conclude that it erroneously excluded probative Section 5 evidence.[23]

2. Apparently recognizing this, appellants seek to mischaracterize the district court opinion as holding that otherwise probative evidence of discriminatory purpose somehow becomes incompetent because it also is relevant to Section 2. The district court said no such thing, as is made particularly clear by analyzing the argument that the Justice Department *actually* advanced below.

As part of its ongoing effort to have Section 5 courts convert their analysis of the purpose of a voting change into a full-blown Section 2 trial of the underlying system being changed, the United States argued that, even if Section 2 is not properly an issue before the Court, the Court should nevertheless consider and rule upon "*all* the evidence . . . demonstrating how clear the Section 2 violation is." U.S. Post-Trial Br. 36. *See infra* note 5. The Court was supposed to engage in this seemingly pointless inquiry because, if the Court found a Section 2 violation, it could use the "School Board's . . . awareness that the proposed plan might violate Section 2" to conclude that the Board had a "discriminatory purpose in adopting the proposed plan." *Id.* It also identified

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[23] In a truly pathetic attempt to suggest that the district court did not follow *Miller*'s analysis, and that *Miller* considered Section 2 "results" evidence, the Solicitor General maintains that *Miller* did consider such results because "the Court considered the [redistricting] plan's ameliorative impact." U.S. Br. 22 (citing 115 S. Ct. at 2492). To be sure, the *Miller* Court, like the court below, did point out that the initial Georgia redistricting "plans were 'ameliorative' and could not have violated § 5's non-retrogression principle." *Miller*, 115 S. Ct. at 2492. App. 10a ("And, all parties agree that the School Board's proposed redistricting will not have a retrogressive effect."). Both courts then considered whether the choice of the redistricting plan with a greater adverse impact (less "safe" black seats) reflected a discriminatory purpose. Neither court, however, examined the Section 2 results evidence concerning racial bloc voting or prior historical discrimination that the Justice Department urged upon both courts.

one subset of Section 2 evidence – "the history of discrimination in Bossier Parish, especially discrimination affecting the right to vote" – as "independently relevant to the purpose issue." *Id.* Thus, the Justice Department drew a clear distinction between that subset of Section 2 evidence that was "independently relevant" on its own terms to Section 5 purpose and the other "Section 2 evidence" that should be considered to resolve whether there was a Section 2 violation.

The court below quite properly rejected the Justice Department's effort "to do indirectly what it cannot do directly" by refusing to conduct "full-blown section 2 litigation" on an issue not properly before it. App. 23a (quoting *New York v. U.S.*, 874 F. Supp. at 399). This in no way implies the very different proposition that the court rejected evidence that is "independently relevant" to the Section 5 purpose inquiry simply because it might also be relevant to a Section 2 violation. As noted, the court's explicit characterization of "section 2 evidence" as "evidence relevant *only* to a Section 2 violation" eliminates any potential ambiguity on this point. Moreover, *every* statement by the district court further demonstrates that it was rejecting only the Justice Department's back-door effort to introduce all Section 2 evidence by equating the Section 2 violation with discriminatory purpose, but was not making the indefensible ruling that otherwise material evidence of purpose somehow should be excluded because it was also relevant to Section 2.[24] Appellants can

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[24] The court stated that it would not resolve "alleged section 2 *violations*" even if advanced by appellants "under the guise of 'purpose' evidence." App. 23a. (emphasis added). It did *not* say it refused to consider legitimate evidence of Section 5 purpose because it also might be relevant to establishing a Section 2 violation. Quoting *Miller*, *Texas*, and *New York*, it noted that resolving whether a "voting-procedure change[ ] . . . " was motivated by a discriminatory purpose is a much narrower and different inquiry than "full-blown section 2 litigation" challenging "the existence of an allegedly discriminatory system." App. 23a. In light of these "differing standards," the court, like this Court in *Shaw*, would not permit inapposite "section 2 evidence to prove discriminatory purpose under Section 5." App. 23a-24a.

point to nothing in the opinion which suggests the district court's exclusion of the "section 2 evidence" urged upon it by the U.S. was accompanied by an additional, *sub silentio* exclusion of evidence relating to *both* "section 2" and Section 5.[25] Thus, like the Section 5 courts in the *New York* and *Texas* cases, the court below simply rejected the United States' facially implausible argument that the existence of a Section 2 violation in the underlying system, or the submitting jurisdiction's "awareness of" that potential violation, somehow established discriminatory purpose in their choice of competing redistricting plans; thus requiring consideration of "all" Section 2 evidence. Indeed, appellants now concede that *Miller*, *New York* and *Texas* did not purport to exclude relevant purpose evidence because it might come under the rubric of Section 2 proof. U.S. Br. 21; A-I Br. 24. They therefore cannot explain how the court below's direct quotation of these holdings somehow was intended to adopt a different rule.

3. Moreover, the district court's consideration of the evidence before it plainly shows it discussed all probative evidence and did not erect some prophylactic ban against evidence potentially relevant in a Section 2 case. Appellants repeatedly maintain that the "court specifically refused to consider the discriminatory effect of the challenged redistricting plan on minority voters" because of its purportedly reflexive aversion to anything that looked like Section 2 evidence. U.S. Br. 17; *see* A-I Br. 24. Appellants cannot cite any passage in the district court containing this "specific refusal," however, because it is wholly a figment of their imaginations.

To the contrary, the district court quite clearly, thoroughly and directly considered the adopted redistricting

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[25] The district court twice used the phrase, "section 2 evidence" without explaining again that this referred to evidence "relevant only" to the Section 2 violation. But the court had already provided this explanation and, even when ripped from its context, the phrase "section 2 evidence" does not connote evidence relevant to *both* Section 2 and Section 5. Moreover, as noted, this discussion was in a context where the Justice Department had drawn a clear distinction between "section 2 evidence" and evidence "independently relevant" to Section 5 purpose.

plan's effect on minority voters. Indeed, it devoted virtually all of the relevant part of the opinion to resolving precisely this question. To be sure, the court did not engage in the ritualistic formula of independently listing "impact" as a "important starting point" for analysis under *Arlington Heights*. Rather, like *Miller*, *Shaw II*, and virtually all other discriminatory purpose opinions, the court cut directly to the dispositive question "started" by the existence of impact: did the Board have "legitimate, nondiscriminatory motives" for adopting its plan over the maximization plan offered by the NAACP, *i.e.*, a plan with less adverse impact. App. 27a n.14. It would, of course, have been irrational and meaningless to compare the relative merits of the NAACP plan and the Board's plan unless the court was considering the alleged negative impact of the Board's plan (as compared to the NAACP plan) in resolving whether it was adopted "because of" that impact. *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979) ("Discriminatory purpose . . . implies that a decisionmaker" selected a course of action " 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."). The court assumed that fewer safe black districts negatively affected black voters' electoral opportunities, but found that such an impact was not violative of Section 5 because the failure to create such safe districts was done "in spite of" that impact. *Id.* Thus, the court below engaged in precisely the sort of inquiry this Court has used to resolve all questions of discriminatory purpose, in the voting rights context and elsewhere.

To be sure, in assessing whether the racial impact was justified because it was free of invidious purpose, the court below did simply *assume* that fewer "safe" black seats negatively affected black voters. Accordingly, like *Miller* and *Shaw II*, the court did not trudge through the *antecedent* evidence of racial bloc voting, the depressed socio-economic status of blacks in the Parish, Louisiana's familiar history of racial discrimination, or any of the similar Section 2 evidence appellants urged upon it. But all such evidence is relevant only to the question of whether the Board's redistricting plan had an adverse impact or "result," which the district court

assumed it did, and says nothing about the Board's purpose in choosing that plan.

As the *Gingles* preconditions reflect, the probative value of racial bloc voting and minority electoral success is to "prove that the challenged electoral mechanism [an at-large plan or single-member plan with majority white districts] impairs the [minorities'] ability 'to elect.' " *Gingles*, 478 U.S. at 48-49 n.15. Similarly, the primary relevance of "historical discrimination" is to show that such state action contributed to "restrict[ing] the present opportunity of blacks effectively to participate in the political process." *Rogers v. Lodge*, 458 U.S. at 625. *See Gingles*, 478 U.S. at 69 ("Voting Rights Act [is intended] to eradicate inequalities in political opportunities that exist due to the vestigial effects of past purposeful discrimination.").[26] Accordingly, such evidence is designed to show that, in light of "past and present reality," the electoral processes are not "equally open" to minority voters, and thus seemingly neutral devices, such as at-large systems, actually have a negative impact on minority voters. *Rogers*, 458 U.S. at 622 (quoting *White v. Regester*, 412 U.S. at 769-70). Moreover, in keeping with the avowed purpose of amending Section 2 to replace the subjective "intent" inquiry with the objective "results" analysis, virtually all other Section 2 evidence is also intended to show that a "certain electoral law, practice or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters. . . . " *Gingles*, 478 U.S. at 47. *See id.* at 44-45 (listing Senate Report factors). However, if a community is free of racial bloc voting and historical suppression of minorities, "minority citizens are able to form coalitions with voters from other racial and ethnic groups, having *no need* to be a majority within a single district." *Johnson*, 114 S. Ct. at 2661 (emphasis added). Put simply, then, the Section 2 evidence tells us *why* a black majority district is *needed* to elect black candidates, but it

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[26] *See also Rogers*, 458 U.S. at 624-26.

says nothing about *why* a black majority district was *not created*.

The district court was thus properly indifferent to whether this Section 2 evidence might show that Bossier Parish was an electoral community where white majority districts actually had the "result" of diluting minority voting strength, since it presumed that white majority districts had such an effect in resolving the only relevant purpose question. Consequently, the evidence establishing that white majority districts had a negative impact was utterly superfluous or, more accurately, could only *harm* appellants' case by opening up the question of negative impact that the court was prepared to presume existed.

For this reason, the fact that *Rogers* found evidence of racial bloc voting and socio-economic disparities attributable to historical discrimination "relevant" in constitutional challenges to existing at-large systems plainly does not suggest that the courts must analyze such evidence in a Section 5 purpose case. In *Rogers*, in order to meet their burden, plaintiffs needed to *establish* both that the at-large system prevented electoral success and that it had been "maintained for the purpose of denying blacks equal opportunity to the political process in the county." 458 U.S. at 627. Accordingly, the presence of racially polarized voting, depressed black turnout, as well as the causative effect historical discrimination played in such phenomena, was not only "relevant," but *essential* to establishing state-sanctioned minority vote dilution. Such evidence was necessary to show that the facially neutral at-large system had the foreseeable impact of perpetuating and exacerbating "the lingering effects of past discrimination," a *prerequisite* to finding discriminatory purpose. *Id.* at 626.

In a Section 5 case, however, there is no need to consider this antecedent evidence establishing the foreseeable negative impact of majority white districts if the Court *presumes* such foreseeable negative impact, in determining whether such impact was the government's purpose. In a typical constitutional challenge brought against a political jurisdiction such as the *Rogers* case, *plaintiffs* must *establish* that the existing

electoral conditions render facially neutral, majoritarian electoral systems dilutive of minority voting strength, as a prerequisite to establishing that dilution was the government's deliberate purpose. In a Section 5 case where the submitting jurisdiction has the burden, it is assumed, due to the racial polarization and prior discrimination that renders the jurisdiction subject to Section 5 preclearance, that such racially-charged electoral conditions exist and white majority districts will thus have a foreseeable impact. Thus, courts proceed directly to the only relevant question of whether such impact is motivated by a discriminatory purpose. Consequently, the district court was entirely correct that evidence concerning current electoral conditions, and prior historical discrimination, was superfluous (unless, of course, the submitting jurisdiction put impact at issue by arguing that white majority districts would have no negative impact because voting is race-blind and minorities had overcome prior discrimination). Thus, we cannot understand how the *appellants* can complain that the district court relieved them of the obligation to establish the *Gingles* preconditions and the ongoing effects of prior official discrimination.

2. This is not to say, of course, that a "series of official actions taken for invidious purposes" by the particular governmental actor is irrelevant to the question whether this specific voting change was motivated by the same invidious purposes. *Arlington Heights*, 429 U.S. at 267. Such "prior bad acts" evidence is generally relevant to show that the decision at issue was part of an intentionally discriminatory pattern. However, none of the "historical discrimination" canvassed by appellants or the dissenting opinion, and eschewed by the district court, is remotely related to, or demonstrative of, prior discrimination by the School Board in this case. Rather, it is simply the familiar recitation of reprehensible actions by the Louisiana state legislature "dating back to the Civil War," which are wholly unrelated to any action specifically undertaken by Bossier Parish, much less the current School Board. U.S. Br. 4-5; A-I Br. 7. Even in a typical case, such "past discrimination cannot, in the manner of original sin, condemn government action that is not itself unlawful." *Mobile*, 446

U.S. at 74. This is particularly true where, as here, the condemned action is performed by "unrelated government officials" such as the state legislature. *Id.* at 74 n.20.

Moreover, the irrelevance of such historical discrimination is particularly obvious in the Section 5 context. All covered jurisdictions, particularly Southern jurisdictions, share the same sorry racial history and that, of course, is why they are subject to Section 5's extraordinary requirements in the first place. *See South Carolina v. Katzenbach*, 383 U.S. at 310-13. More particularly, this history is the reason that these governments are stripped of the normally strong presumption of legitimacy and forced to carry the burden of disproving discriminatory purpose. To add to that already onerous burden by also using that history as a basis for finding a particular governmental unit's discrete decision discriminatory, even when supported by credible nonracial reasons that would be credited if undertaken by Northern jurisdiction, is indeed impermissible "double counting." App. 24a n.12. The fact that the Bossier Parish School Board, like all other Section 5 jurisdictions, is situated in a State with a discriminatory history which the Board is not responsible for and cannot change, simply does not make it "more probable" that it selected a redistricting plan for discriminatory purposes. Fed. R. Evid. 401. This Court therefore properly ignored the existence of such evidence in Georgia and North Carolina when it resolved the discrete Section 5 purpose issue in *Miller* and *Shaw*.

We are left, then, with one species of evidence that appellants maintain does reflect on *this* School Board's discriminatory *animus*: the fact that Louisiana schools were *de jure* segregated and the Bossier Parish school system has not yet been declared unitary. A-I Br. 7-8; U.S. Br. 5-6. Appellants maintain that this is directly probative evidence of the Board's racist actions and that the district court ignored such evidence of "responsiveness" and "historical discrimination" pursuant to its generalized exclusion of all evidence touching on Section 2. Appellants are manifestly wrong on both counts. First, the district court did independently consider the School Board's desegregation activities. App. 34a n.18. While the

court, quite properly, peremptorily dismissed such evidence as reflecting any racial *animus* here, the relevant point is that it did *consider* such evidence. It would not have done so had it already, as appellants erroneously maintain, categorically excluded all probative purpose evidence because such evidence was also relevant to the Section 2 "results" test. On the merits, the fact that the Parish's schools are not perfectly racially balanced due to demographic changes and that an advisory desegregation committee lapsed into disuse 20 years ago is clearly not, as the district court properly found, "in any way related to the School Board's purpose in adopting the Police Jury plan."[27] App. 34a n.18. *Cf. Bolden*, 446 U.S. at

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[27] The initial biracial committee last met twenty years ago in 1976, when perhaps one current Board member was serving. This committee was established pursuant to a *consent* decree and was charged with "recommend[ing] to the School Board ways to attain and maintain a unitary system and to improve education. . . . " App. 103a (¶ 111). This plainly implies that it was intended merely to ease the transition to a unitary system, not serve as a permanent governmental bureaucracy. Given this limited role, it is entirely understandable that the interest of the volunteer citizens who served on the committee waned over time. There is nothing in the record suggesting that the Department of Justice, the other *Lemon* plaintiffs or the black community ever complained about its dormancy. The appellants' attempt to draw a discriminatory inference from the establishment and disbandment of a newly constituted biracial committee is equally misguided. In fact, the School Board demonstrated its responsiveness to the black community by *voluntarily* establishing this committee in 1993 at the request of the NAACP. App. 104a (¶ 113). As the district court found, the committee was dismissed when it exceeded its advisory role in achieving a unitary system and instead began to involve itself in matters relating to educational, rather than desegregation, policy. As the Court has often recognized, such policy "is committed to the control of state and local authorities." *See, e.g., Board of Curators of the Univ. of Missouri v. Horowitz*, 435 U.S. 78, 91 (1978); *Milliken v. Bradley* , 418 U.S. 717, 741-742 (1974). Nor is there any evidence suggesting that any of the School Board's attendance lines violate the court's orders. Therefore, the racial imbalance in five schools complained of by the appellants is necessarily attributable to demographic factors over which the School Board has no control and against which it has no duty to countervail. *See*

73-74 (Even *purposeful* discrimination against blacks in employment and public services by the *current* defendant government is "relevant only as the most tenuous and circumstantial evidence of the constitutional invalidity of the electoral system. . . . "). While the Justice Department was apparently intent on litigating their ongoing desegregation case with the Parish, as well as the Section 2 case, in this Section 5 proceeding, the district court's discounting of such desegregation evidence was proper, and certainly not "clearly erroneous."

In sum, the Justice Department has unsuccessfully mounted a sustained campaign to have Section 5 courts strike down legitimate changes to underlying electoral systems on the grounds that the underlying electoral system is racially polarized and has a discriminatory lineage. Since the submitting jurisdictions are not responsible for private citizens' voting patterns or for prior historical discrimination, and since neither those patterns nor that history would be altered *regardless* of which voting change is selected, this evidence is clearly irrelevant to the focused inquiry on *why* the submitting jurisdiction chose the nonretrogressive plan it did.

III. The Court Below's Factual Finding That The School Board Acted Without A Discriminatory Purpose Is Not Clearly Erroneous

Findings of fact, particularly those relating to motive or intent, may "not be set aside unless clearly erroneous." *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982).[28] Given

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Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 436-37 (1976) (holding that a district court is "not entitled to require [a school board] to rearrange its attendance zones each year so as to ensure that the racial mix desired by the court was maintained in perpetuity"); *Freeman v. Pitts*, 503 U.S. 467, 494 (1992).

[28] *See id.* at 288 ("[Findings] as to the design, motive and intent with which men act are peculiarly factual issues for the trier of fact" (quoting *United States v. Yellow Cab Co.*, 338 U.S. 338, 341 (1949)); *City of*

that the district court's factual findings are amply supported by the record, there is no plausible basis for characterizing its findings as clearly erroneous.

Indeed, once again, there is "no reasonable basis" for appellants' argument that the Board selected the Policy Jury plan in preference to the NAACP alternative because of a discriminatory purpose. *Miller*, 115 S. Ct. at 2492. The Board was offered a choice between two alternative redistricting plans. As the undisputed facts establish, one plan had been precleared by the Justice Department, supported by the black member of the Police Jury's Reapportionment Committee, enhanced minority voting strength and clearly complied with state law and traditional districting principles, such as compactness and maintaining the integrity of municipal, district and precinct boundaries. J.A. 47; J.A. 42. The other alternative concededly constituted a facial violation of state law which the School Board was without power to change, required more than doubling the number of existing precincts, split every municipal boundary in the Parish, grossly departed from the Police Jury districts and created black majority districts that were plainly not compact under any normal definition of that term. J.A. 48-49; plaintiff's Exh. 11. It was further conceded that the sole, not only "predominant," reason for so "subordinat[ing] [traditional] districting principles" was to racially discriminate in favor of black voters. J.A. 260; *Shaw II*, 116 S. Ct. at 1901 (quoting *Miller*, 115 S. Ct. at 2488).

Indeed, so far as we can discern, this case is unique in the annals of discriminatory purpose jurisprudence in that the minority proponents cannot offer a *single nonracial* reason for adopting the minority-enhancing alternative. Appellants cannot cite *one* traditional districting principle in which the

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Pleasant Grove v. United States, 479 U.S. 462, 469 (1987) (holding that under Section 5, "findings, both as to the purpose [of adopting a voting change] and with respect to the weight of evidence regarding the purpose of the [changes] at issue, are findings of fact that we must accept unless clearly erroneous"). *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985).

proposed NAACP alternative is superior to the Police Jury plan. Conversely, in several key respects – compliance with political boundaries, maintaining precincts, compactness, compliance with state law – the NAACP maximization alternative is both obviously inferior to the Police Jury plan and, in fact, materially indistinguishable in purpose and effect from the racial gerrymanders this Court has repeatedly struck down as unconstitutional. Indeed, the deficiencies in the NAACP alternative are so apparent that even appellants abandoned it as a viable plan at trial, seeking to substitute the *post hoc* alternative "Cooper" plans (which nevertheless retained all of the deficiencies outlined above).

Moreover, there is no assertion or showing that the Police Jury plan in any way "packs" or "fragments" any concentration of minority voters or otherwise "split (or lumped) minority neighborhoods that would have been grouped into a single district (or spread among several) if the [Board] had employed the same line-drawing standards in minority neighborhoods as it used elsewhere in the jurisdiction." *Johnson*, 114 S. Ct. at 2659. To the contrary, as is demonstrated by the fact that the Police Jury plan was precleared after careful scrutiny by the Justice Department, the plan kept intact any reasonable concentration of minority voters that was feasible under neutral principles and state law. In a Parish with a 20.1% black population, this resulted in the creation of two districts with 45% and 43.7% black populations, respectively, and four districts with black populations of between 21 and 29%. J.A. 47. It merely did not seek, as the NAACP plan concededly did, to unite through a conscious gerrymander widely dispersed black concentrations that never would have been united were their racial composition different.

As even this brief review demonstrates, appellants' real complaint is not that the Board subordinated neutral principles in order to discriminate against minority voters, but that they failed to subordinate such principles in order to discriminate in favor of minority voters. The Justice Department candidly said as much to the district court, when it explicitly argued that if "the Bossier Parish School Board declined to take race into account [to prefer minorities this] would indeed

violate Section 5." App. 24a n.12. As in *Miller* and *Shaw II*, then, the Justice Department expressly equates a failure to maximize with a discriminatory purpose, at least absent some absolutely compelling reason that *necessarily* forecloses maximization. *See, e.g.*, DOJ Objection Letter, App. 156a (School Board "is not free to adopt a plan that *unnecessarily* limits the opportunity for minority voters to elect their candidates of choice.") (emphasis added).

The Court should again reject the Justice Department's attempt to equate racial discrimination with the failure to engage in racially preferential treatment for minorities. Most fundamentally, this is because the assertion that race-blind actions constitute intentional racial discrimination is a classic oxymoron. Somewhat less directly, but no less significantly, basing a "purpose" finding on the failure to engage in race-based redistricting creates an inexorable hydraulic pressure on governments to adopt an unconstitutional racial gerrymander that subordinates traditional districting principles. *Cf. Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 993 (1988); *Wards Cove Packing Co., Inc. v. Antonio*, 490 U.S. 642, 653 (1989). As this Court has noted, local governments must be given leeway to reconcile the potential tension between the "results" demands of Section 2 with the Constitution's command to avoid race-conscious redistricting that subordinates neutral principles. *Vera*, 116 S. Ct. at 1961; *id.* at 1969 (O'Connor, J., concurring). If this Court were now to require district courts, notwithstanding Rule 52, to infer discriminatory purpose when the government simply rejects a concededly race-conscious gerrymander that violates state law and traditional principles, it will have destroyed that leeway by forcing governments to engage in such gerrymanders. This would be particularly ill-advised because, even assuming there is some inevitable potential tension between Section 2 and the Equal Protection Clause, there is obviously no such tension between the "purpose" requirement of Section 5 and the "purpose" requirement of the Fourteenth Amendment: both are plainly satisfied by racial neutrality towards all groups. Indeed, this Court has already held that such a "race-neutral" plan is the only constitutionally permissible

remedy for violating Section 5's purpose requirement. *Shaw II*, 116 S. Ct. at 1904 n.6 ("Even if discriminatory purpose could be shown, the means of avoiding such a violation could be race-neutral, and so we also doubt that the prospect of violating the purpose prong of § 5 could justify a race-based redistricting plan. . . . "). Since race neutrality is the touchstone of any liability or remedy, it is virtually, if not theoretically, impossible that a redistricting plan which more directly adheres to neutral redistricting standards than the maximizing alternative reflects racial animus, and it is quite impossible to hold a contrary finding "clearly erroneous." As we now show, the plan selected by Bossier Parish was just such a redistricting plan, which cannot be found to violate Section 5 without both redefining discriminatory "purpose" and compelling the adoption of an unconstitutional racial gerrymander.

1. The short, and dispositive, explanation for why the Board had a completely legitimate, nondiscriminatory reason for rejecting the proposed NAACP alternative is that this alternative (or even any variant thereof)[29] facially violated a state law that the Board was powerless to evade. The Board was required to use the precincts created by the Police Jury (and used by the Police Jury for its districts) as the "building blocks" for the Board's districts. Louisiana law is quite unequivocal on this point: "[t]he boundaries of any election district for a new apportionment plan from which members of a school board are elected shall contain whole precincts established by the parish governing authority [i.e., the Police Jury]. . . . " J.A. 265-66. The failure to abide by this

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[29] Given that the Cooper plans were not even formulated until after the School Board had adopted its plan, they are clearly irrelevant to this proceeding. In any event, these plans clearly subordinate traditional redistricting principles to racial considerations. Even the "best" of these plans splits all but one of the Parish's towns, results in 31 precinct splits and is not compact. J.A. 51. *See* Plaintiff's Exh. 10 (lodged with the Court).

mandatory requirement renders the School Board's redistricting plan "null and void."[30] J.A. 266.

The Police Jury established 56 precincts for this decade in 1991, which the School Board was thus obliged to use to build its own districts. The district lines in the NAACP plan, however, cut 46 of those precincts, some of them more than once, for a total of 65 different precinct splits. App. 29a; Plaintiff's Exh. 11. The appellants seek to portray this as a mere inconvenience. To the contrary, these 65 separate violations of state law rendered the NAACP plan a nullity and did indeed "legally preclude the Board from considering the plan." U.S. Br. 9.

Appellants maintain that *another* entity, the Police Jury, could have helped the School Board evade this state law. What they mean by this is that the School Board would have been in technical compliance with the requirement that their precincts be coextensive with the Police Jury's, if the Police Jury had voluntarily decided to create 65 additional precincts to track the School Board's precincts under the NAACP plan. What appellants cannot provide is any rational, *nonracial* reason why the Police Jury (or the Board) would ever engage in such a bizarre, costly and confusing exercise.

Every objective reason strongly counseled against more than doubling the existing number of precincts in this poor rural parish. This Court has already vividly described the "electoral nightmare" and "multiplied" costs caused by racially-motivated line drawings which required Harris County, Texas to almost double its existing precincts and "thrust voters into new and unfamiliar precinct alignments, a few with populations as low as 20 voters." *Vera*, 116 S. Ct. at 1959. *See Shaw II*, 116 S. Ct. at 1904 (traditional districting principles furthered by "keep[ing] precincts whole"); *Johnson v. Miller*, 864 F. Supp. 1354, 1367, 1376 (S.D. Ga. 1994) (criticizing precinct

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[30] In an attempt to confuse this issue, appellants state that the Police Jury had modified the precincts used in the 1980's when it adopted its 1991 redistricting plan. This is quite true, but entirely beside the point. No state law prohibits the Police Jury from changing its prior precincts to reflect population shifts and conform with its new districts, but once it has done so, the Board must use those precincts to build its districts.

splits). The situation in Bossier Parish was even worse than that envisioned for Texas and Harris County. The number of precincts would have increased *115%*, from 56 to 121, and 17 of those 65 new precincts would have had less than 20 people in them. Plaintiff's Exh. 11, pp. 1-26. In addition to producing the problems noted in *Vera*, the cost of each new precinct was approximately $850 or, in the aggregate, $55,250, for *every* state, federal and local election.[31] J.A. 171. Finally, but perhaps most important, "cutting across pre-existing precinct lines and other natural or traditional divisions, is not merely evidentially significant; it is part of the constitutional problem insofar as it disrupts nonracial bases of political identity, and thus intensifies the emphasis on race." *Vera*, 116 S. Ct. at 1962.

On a subjective level, of course, the Police Jury (and the Board) never would have believed that such massive, racially-motivated addition of precincts was necessary to secure the Justice Department's Section 5 approval since the Department had just precleared the Police Jury's districts and precincts a year before. Moreover, as the district court noted, the Police Jury had previously "rebuffed the School Board's earlier overtures" for "joint redistricting," and, after the Justice Department objected to the Board's plan, "[o]nce the idea of redistricting the police jury districts was presented, the Police Jury dismissed it real quickly." App. 29a; App. 91a, (¶ 79). After the Justice Department's objection, it is hardly surprising that the Police Jury wanted to maintain the *status quo* since a massive alteration of precinct boundaries, predicated on the need to depart from intentionally discriminatory Police Jury district lines, would have been a damaging admission of the Police Jury's *own* liability. The School Board therefore had every objective and subjective reason not to quixotically request that the Police Jury conspire with it to wreak costly

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[31] Appellants suggest that such costs could have been potentially reduced through joint polling places for a number of precincts. This would have saved little, however, because the law expressly requires that *each* precinct have at least one voting machine, even if it is in a shared polling place (in order to be able to accurately tally the votes cast in each precinct). La. Rev. Stat., tit. 18 § 1363(A).

havoc on the electoral system, and the Police Jury had every such reason to refuse.

Though appellants must concede that there is no legitimate, nonracial reason for destroying the existing precinct system, they apparently claim that such reasons were *post hoc* pretexts invented by the Board.[32] But the undisputed facts establish that the *contemporaneous* explanation for rejecting the NAACP alternative was that the district attorney and the Board's cartographer both correctly informed the Board that the NAACP's massive precinct splitting was a facial violation of state law. App. 6a; App. 99a (¶ 102). Moreover, although the Police Jury and School Board used different *district* lines for the first time in the 1980's, they had *never* split precinct lines and there is no evidence that any of the redistricting plans submitted for the Board's consideration by its cartographer created such splits. The United States says that precinct splitting in Louisiana is "quite common," but this is a deliberate distortion of the record. While, as the stipulation cited by the Justice Department reflects, differing *district* lines may be "common," appellants' own witness was able to cite only 3 such examples, and all of those apparently were done to

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[32] They further argue that the district court did not *believe* this pretextual explanation, but erroneously found an absence of discriminatory purpose because the Board "could have" not wanted to destroy precincts. U.S. Br. 30; App. 38. This is plainly untrue. The Court's opinion noted that the *contemporaneous* explanation for rejecting the NAACP plan was the precinct splits. App. 6a. It further noted that the School Board had "offered a host of non-discriminatory reasons for adopting the Police Jury plan." App. 27a. It rejected some offered explanations because they were not "the real reasons," but was "satisfied that at least two of these are 'legitimate' " – "guaranteed preclearance" and "no precinct lines would need redrawing." App. 27a-28a (quoting *New York*, 874 F. Supp. at 400). This plainly demonstrates that the Court was clearly accepting only the "real reasons" motivating the Board at the time of the decision, not manufacturing or crediting untrue *post hoc* rationalizations. When the opinion later said, after canvassing the merits of avoiding precinct splits, that the Board "entirely reasonably could have" desired no precinct splits, it was obviously concluding that the Board's subjective motivation was also objectively credible and important. App. 29a.

accommodate Justice Department objections. J.A. 240; J.A. 137-138. None remotely approached the massive 65 precinct splits of the NAACP plan; the greatest number of splits in other jurisdictions was eight. J.A. 238. Even assuming practices in *other* parishes somehow undermines Bossier Parish's longstanding, uniform practice of preserving Police Jury precincts, the fact that a handful of other parishes buckled to the Justice Department's demands to split a *few* precincts hardly casts doubt on the legitimacy of the Board's adherence to state law or its refusal to engage in futile, costly and irrational efforts to have the Police Jury help it evade this important requirement.

Since it is impossible to create a black majority district without splitting a very significant number of precincts, and since there was neither any rational reason to, nor reasonable hope of, evading the state law prohibition against such precinct splits, this reason alone sufficed for the Board to reject the plan and for the district court to find no purpose. App. 115a (¶ 152); J.A. 167. We nevertheless note that the Police Jury plan had a host of other legitimate nondiscriminatory advantages over the NAACP's proposed racial gerrymandering. In the past two Terms, the Court has accepted adherence to each such traditional redistricting principle as a refutation of any discriminatory purpose finding and found departures from each such principle sufficient to condemn racial gerrymanders.

First, the NAACP's proposed lines were at war with every other political boundary in the Parish. Most obviously, while the School Board plan tracked precisely the Police Jury's districts, the maximization alternative used completely different district lines. Plaintiff's Exh. 11 (first page). Such complete divergence between district lines greatly compounded the "voter confusion" caused by the precinct splits because it prevented "[communities] [from] shar[ing] . . . representatives" with common interests. *Vera*, 116 S. Ct. at 1959; *see Shaw II*, 116 S. Ct. at 1904 (a legitimate nondiscriminatory principle is to "avoid dividing counties into more than two districts."). Similarly, while the Police Jury plan and all prior redistricting plans scrupulously maintained the integrity of municipal

boundaries within the Parish, the maximizing alternative exhibited "utter disregard of city limits" by splitting *all* three towns in the Parish. *Vera*, 116 S. Ct. 1959; *Miller*, 115 S. Ct. at 2484. A black majority district in the northern part of the Parish was not possible unless these small towns were split "in order to capture pockets of [black] residents" living within municipal limits. *Vera*, 116 S. Ct. at 1959.

With respect to compactness, while the School Board's northern district (District 4) is a square, regularly shaped district, the NAACP creates two long, narrow jagged districts (Districts 2 and 12) that are "somewhat hooked-shaped . . . with finger-like extensions" that "wind in a snake-like fashion . . . until it gobbles in enough enclaves of black neighborhoods." *Shaw II*, 116 S. Ct. at 1899; *Vera*, 116 S. Ct. at 1954-55. Similarly, in Bossier City, the NAACP's black-majority and adjacent districts (Districts 1 and 6) are even skinnier, more distended and less compact than the northern districts.[33] This is in contrast, again, to the School Board's

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[33] Appellants cite to a stipulation that purports to demonstrate the compactness of their proposals for the black-majority district in Bossier City. App. 1, ¶ 36. This stipulation, however, has no bearing on and makes no reference to the plans proposed by the appellants. Instead, when placed in context, it suggests that it was obvious, apparently to some unnamed members of the Police Jury in 1991, that one "reasonably compact" majority-black district could be established within Bossier City. This *subjective* assessment of some of the Police Jurors has no reference to the *objective* feasibility of creating a "reasonably compact" black-majority district in Bossier City. Furthermore, even if the Court were inclined to adopt a broad construction of the stipulation at issue, the facts relating to the stipulation were contested at trial. The parties introduced substantial evidence reflecting on the feasibility of creating a "reasonably compact" majority-black district in Bossier City. *See, e.g.*, Plaintiff's Exh. 11; J.A. 48-49, J.A. 51-52, J.A. 260-61. Thus, the stipulation should be disregarded. *PPX Enter., Inc. v. Audiofidelity*, 746 F.2d 120, 123 (2d Cir. 1984) (a court is entitled to disregard a stipulated fact where "substantial" evidence is presented to contradict such stipulation); *Coastal States Marketing v. Hunt*, 694 F.2d 1358, 1369 (5th Cir. 1983) (asserting that a court has "not only the right but the duty" to relieve a party from a pretrial stipulation where "substantial evidence" is presented to contradict the stipulation).

districts that are quite compact, especially given population concentrations, the bordering river and Parish boundaries. The Plan's departures from compactness are inherently required to create both black majority districts. This is evidenced by the fact that the best version of any such plan, ("Cooper I") was condemned by a federal district court, "as resembl[ing] an octopus, as it stretches out to the nooks and crannies of the parish in order to collect enough black voting age population to create not one, but two majority-black districts in Bossier." J.A. 38. Even a cursory glance at the maps reveals that both black majority districts are far less compact, and more unwieldy, than the Georgia district struck down in *Miller*. *Cf. Miller*, 115 S. Ct. at 2477, 2495.

The only "flaw" appellants seek to identify in the Police Jury plan is that it did not sufficiently provide for "incumbency protection" because it "paired" incumbents in two districts.[34] While the Board may have initially perceived this as a "flaw" in the Police Jury plan, it is certainly not a "flaw" *in relative terms*. As appellants elsewhere argue when it fits their purposes, and as is evident from the NAACP plan's dramatic departure from the 1980's district configurations, that plan would have disrupted incumbents' desired and existing districts more substantially than the Police Jury plan. U.S. Br. 26 n.15. Thus, even if the desire of "representatives [to] select [their] people" should be elevated to the status of a beneficial redistricting principle serving the public interest, the NAACP's plan is worse in this regard as well. *Vera*, 116 S. Ct. at 1954. Thus, contrary to appellants' argument, if incumbency was a "factor usually considered important by the decisionmaker [it did] not strongly favor a decision contrary to the one reached . . . " and thus provides no basis for an "inference of discrimination." U.S. Br. 27 (quoting *Arlington Heights*, 429 U.S. at 267 & n.17). To be sure, some Board members probably did initially resist the Police Jury plan because of the "pairs" and desired a plan that better "protected" everyone. This

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[34] There is no evidence that the appellants newly-discovered "a school building in every district" rule was ever a redistricting principle in the Parish, or that the NAACP plan adhered to it at all. U.S. Br. at 26-27.

potential defect, from a self-interested perspective, of the Police Jury plan, however, was outweighed by the fact that, among any of the plans arguably consistent with state law and districting principles, the Police Jury plan *alone* "guaranteed preclearance" in the face of the NAACP's opposition. App. 28a. Such accommodation of competing interests hardly suggests a discriminatory purpose, but simply reflects the normal selection process among imperfect alternatives that typifies all redistricting decisions.[35]

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

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[35] The sum total of appellants' purpose case thus reduces to the complaint that the district court failed to sufficiently discount the Board's appointment of a black member for the only vacancy available and did not put the most nefarious possible spin on certain hearsay statements that Board members allegedly conveyed to the appellant-intervenor and other civil rights advocates in the community. App. 30a-31a. This quibbling over the import (or existence) of, at worst, ambiguous acts and statements is of no consequence because "such questions of credibility are matters for the District Court" and this Court will not "second-guess the district court's assessment of the witness's testimony." *Vera*, 116 S. Ct. at 1957. In any event, as even the dissenting opinion conceded, the Board members' alleged "statements standing alone would certainly be insufficient to show discriminatory purpose." App. 53a.

(10) (9)

Supreme Court, U.S.
FILED
OCT 21 1996
OFFICE OF THE CLERK

Nos. 95-1455 and 95-1508

In the Supreme Court of the United States

OCTOBER TERM, 1995

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, APPELLANT

v.

BOSSIER PARISH SCHOOL BOARD

GEORGE PRICE, ET AL., APPELLANTS

v.

BOSSIER PARISH SCHOOL BOARD

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE FEDERAL APPELLANT

WALTER DELLINGER
Acting Solicitor General
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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1455

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, APPELLANT

v.

BOSSIER PARISH SCHOOL BOARD

No. 95-1508

GEORGE PRICE, ET AL., APPELLANTS

v.

BOSSIER PARISH SCHOOL BOARD

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE FEDERAL APPELLANT

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1. As we explained in our opening brief, the district court improperly refused to consider both the racially dilutive impact of the redistricting plan that the Bossier Parish School Board (Board) adopted and the Board's history of discrimination—two important types of circumstantial evidence bearing on the Board's purpose. See *Rogers* v. *Lodge*, 458 U.S. 613, 618, 623-626 (1982). With respect to evidence of a historical pattern of discrimination, appellee contends (Bd. Br. 29) that this Court in

Shaw v. *Hunt*, 116 S. Ct. 1894 (1996) (*Shaw II*), and *Miller* v. *Johnson*, 115 S. Ct. 2475 (1995), "viewed as irrelevant" a covered jurisdiction's "well-documented history of racial discrimination." That contention is plainly incorrect. In each of those cases, the Court concluded that the particular record before the three-judge district court did not support an inference of discriminatory purpose. See *Miller*, 115 S. Ct. at 2492; *Shaw II*, 116 S. Ct. at 1904. It did *not* reject the well-established line of precedent holding that evidence of past racial discrimination is directly relevant to a governmental actor's motivation in adopting a challenged policy. See, *e.g.*, *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 267 (1977) (factors relevant to the purpose inquiry include the "historical background of the decision"—"particularly if it reveals a series of official actions taken for invidious purposes"); *Rogers*, 458 U.S. at 624-625 ("Evidence of historical discrimination is relevant to drawing an inference of purposeful discrimination."); *Busbee* v. *Smith*, 549 F. Supp. 494 (D.D.C. 1982), aff'd, 459 U.S. 1166 (1983) (same); *City of Pleasant Grove* v. *United States*, 568 F. Supp. 1455, 1458 (D.D.C. 1983) (same).

With respect to the dilutive effect of the challenged plan, appellee first contends (Bd. Br. 32-33) that "the district court quite clearly, thoroughly and directly considered the adopted redistricting plan's effect on minority voters," and later suggests (*id.* at 33, 35) that the district court simply presumed that the Police Jury plan adopted by the Board had a dilutive impact. Both of those contentions are incorrect. As to the former, appellees cannot point to *any* discussion of the plan's dilutive impact in the majority opinion below. As to the latter, the district court nowhere presumed that appellee's plan had a dilutive effect on minority voters.

Appellee states (Bd. Br. 33, 34, 35, 36) that "it is assumed, due to the racial polarization and prior discrimination that renders the jurisdiction subject to Section 5 preclearance, that such racially-charged electoral conditions exist and white majority districts will thus have a foreseeable impact." The district court, however, expressly declined to consider such "section 2 evidence" (J.S. App. 23a, 24a), [1] and thus eliminated from its analysis an important category of evidence.[2]

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[1] Contrary to appellee's suggestion, moreover, racially-polarized voting patterns are not among the factors that trigger Section 5 coverage. See 42 U.S.C. 1973b(b).

[2] Appellee places substantial reliance (Bd. Br. 6, 8, 27, 28, 31) on the district court's statement that it did not consider "evidence relevant *only* to the section 2 inquiry." J.S. App. 9a n.6 (emphasis added). The district court, however, clearly refused to address any evidence regarding the dilutive impact of the Board's redistricting plan—a category of evidence that this Court has held to be relevant to the issue of discriminatory purpose, as well as to Section 2. See *Rogers* v. *Lodge*, *supra*.

Appellee also contends (Bd. Br. 30-31, 32 n.25) that the United States had "drawn a clear distinction between 'section 2 evidence' [such as evidence of racial bloc voting] and evidence 'independently relevant' to Section 5 purposes [such as evidence of historical discrimination]." Bd. Br. 32 n.25. We drew no such distinction. The heading of the relevant section of our post-trial brief made clear our position that "[t]he Section 2 evidence presented in this case is independently relevant to material issues outside the Section 2 inquiry." Gov't Post-Trial Brief at 36. In any event, the district court clearly did not limit its exclusion of "section 2 evidence" to evidence of racial bloc voting, nor would that limited exclusion have been warranted given the relevance of bloc voting to the question of foreseeable discriminatory effects. See, *e.g.*, *City of Port Arthur* v. *United States*, 517 F. Supp. 987, 1022 (D.D.C. 1981) (three-judge court) ("Knowing that City politics were seriously polarized by race, the officials responsible for developing the [challenged electoral] plan must have realized the improbability of the black population electing more than one candidate of its choice."), aff'd, 459 U.S. 159 (1982).

Appellee suggests (Bd. Br. 33) that a court is under no obligation to consider evidence that a redistricting plan has a racially discriminatory impact if the court "cut[s] directly to the dispositive question" of what actually motivated the decisionmaker. In appellee's view, evidence of vote dilution "tells us *why* a black majority district is *needed* to elect black candidates, but it says nothing about *why* a black majority district was *not created*." *Id.* at 34-35. This Court has squarely rejected that proposition.

Government officials rarely provide direct evidence of their discriminatory intentions. Because the Voting Rights Act is "aimed at the subtle[] as well as the obvious" discriminatory voting practices, *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 565 (1969), courts must conduct "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266. This Court has repeatedly held that evidence of an action's discriminatory impact is an important category of circumstantial evidence bearing on intent. See, *e.g.*, *Rogers*, 458 U.S. at 623-624; *Washington* v. *Davis*, 426 U.S. 229, 242 (1976); *City of Mobile* v. *Bolden*, 446 U.S. 55, 70 (1980); *Pullman-Standard* v. *Swint*, 456 U.S. 273, 289 & n.18 (1982); *Columbus Bd. of Educ.* v. *Penick*, 443 U.S. 449, 464-465 (1979).

"Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds." *Washington* v. *Davis*, 426 U.S. at 253 (Stevens, J., concurring). Accordingly, a governmental action with foreseeably harmful effects on a discrete group supports an inference that those effects were intended. See *Personnel Admin.* v. *Feeney*, 442 U.S. 256, 279 n.25 (1979) (where adverse consequences of a law on an identifiable group are inevita-

ble, "a strong inference that the adverse effects were desired can reasonably be drawn").

In adjudicating purposeful dilution cases, the courts have thus looked to whether a districting plan's discriminatory effect was understood by, or foreseeable to, the governmental body that enacted it. See, *e.g.*, *Garza* v. *County of Los Angeles*, 918 F.2d 763, 768 n.1 (9th Cir. 1990), cert. denied, 498 U.S. 1028 (1991); *Rybicki* v. *State Bd. of Elections*, 574 F. Supp. 1082, 1108-1109 (N.D. Ill. 1982) (three-judge court). The mere existence of a history of discrimination and a present discriminatory effect does not ordinarily compel a finding of discriminatory purpose. But see *Arlington Heights*, 429 U.S. at 266 ("Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action."); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 342 n.23 (1977) (observing, in a Title VII case, that "the company's inability to rebut the inference of discrimination came not from a misuse of statistics, but from the inexorable zero") (internal quotation marks omitted); *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886). Such evidence, however, is highly relevant to the intent inquiry. Here, the district court erred in refusing to consider how the Board's awareness of the dilutive impact of the Police Jury plan bore on the question of intent.

Contrary to appellee's contention (Bd. Br. 28-30), this Court's decisions in *Shaw II* and *Miller* are consistent with that principle. In those cases, the Court deemed "insupportable" the Attorney General's decision to interpose Section 5 objections to particular congressional redistricting plans. *Shaw II*, 116 S. Ct. at 1904; *Miller*, 115 S. Ct. at 2492. In neither case did the Court refuse to consider the effect of the redistricting plan at issue on minority voters. To the contrary, in each case the Court emphasized that the plan initially adopted by the legisla-

ture was ameliorative—that is, that the plan would have improved the opportunity for minority voters to elect their chosen candidates—and that there was no other "evidence of an intent to discriminate against minority voters." *Miller*, 115 S. Ct. at 2483; see *Shaw II*, 116 S. Ct. at 1904; *Miller*, 115 S. Ct. at 2492-2493.[3] The Court thus concluded that the only possible basis for the Attorney General's objections must have been the States' simple failure to draw as many majority-minority districts as possible—a basis the Court found insufficient to warrant a finding of discriminatory purpose. See *Shaw II*, 116 S. Ct. at 1904; *Miller*, 115 S. Ct. at 2492. Here, by contrast, the plan adopted by the Board perpetuated the dilutive impact of the prior plan—under which no black candidate had ever been elected. See J.S. App. 115a-116a (¶¶ 153-157).[4] Selection of the Police Jury plan was intended to ensure that the existing dilution of minority voting strength would continue.

Appellee also contends (Bd. Br. 3; emphasis omitted) that "[t]here is no competent evidence of racial bloc voting in any local Bossier Parish elections." That is untrue. A

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[3] Indeed, in concluding that North Carolina's rejection of an alternative plan did not reflect a discriminatory purpose, the Court specifically relied on evidence that the State believed the alternative plan to be *less* protective of minority voting strength than the ameliorative plan that it adopted. See *Shaw II*, 116 S. Ct. at 1904 (quoting statement in State's Section 5 submission that the second majority-minority district in the alternative plan "'did not have an effective minority voting majority' because it 'depended on the cohesion of black and Native American voters, and no such pattern was evident' and 'this plan dramatically decreased black influence' in four other districts").

[4] The Board's plan reduced the African-American voting-age population (VAP) in each of the two districts with the largest black VAP concentrations—from 42.1% to 40.9% in District Four and from 36.9% to 36.1% in District Seven. J.A. 44, 47.

regression analysis of the only interracial parish-wide race for local office in recent years (the 1988 primary election for the 26th Judicial District Court) revealed a high degree of racial polarization: the analysis estimated that 79.2% of black voters supported the unsuccessful African-American candidate, while only 28.9% of white voters did so. J.S. App. 122a-123a (¶¶ 183-184); J.A. 113-115. It is appropriate to consider the results in such "exogenous" parish-wide elections where, as here, many districts contain too few precincts to perform a reliable ecological regression analysis for elections that are held in individual districts. See generally J.A. 114-121.[5] The parties stipulated, moreover, that "[o]f the 14 elections since 1980 in which black candidates have run against white candidates for a single-member district or for mayor, only two candidates have won." J.S. App. 127a (¶ 196).[6]

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[5] See *Westwego Citizens for Better Gov't* v. *City of Westwego*, 872 F.2d 1201, 1208-1210 (5th Cir. 1989); *Citizens for a Better Gretna* v. *City of Gretna*, 834 F.2d 496, 502 (5th Cir. 1987) (concluding that *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), "suggests flexibility in the face of sparse data"), cert. denied, 492 U.S. 905 (1989).

[6] Those two candidates (Jerome Darby in Police Jury District 10 and Jeff Darby in Bossier City Council District 2) were elected under unique circumstances that do not detract from the broader pattern of racially-polarized voting in Bossier Parish. See *Gingles*, 478 U.S. at 57. Those candidates were elected in districts that included substantial areas surrounding Barksdale Air Force Base—an atypical factor that reduced the racial polarization and increased comparative African-American voter turnout in those districts. J.S. App. 2a n.1, 117a-118a (¶¶ 160-164), 120a (¶ 172), 127a (¶ 196). When that unique factor no longer obtained following the post-1990 census redistricting, Jeff Darby lost his seat to a white challenger. *Id.* at 120a (¶ 173). (Jerome Darby was not opposed for reelection. *Id.* at 118a-119a (¶ 165)). Nor do the results of the 1996 school board elections detract from the conclusion that significant polarization exists. Cf. Bd. Br. 5 & n.4. This Court

The record thus fully supports Judge Kessler's conclusion that the Board's adoption of the Police Jury plan "effectively excludes minority voters from the political process." J.S. App. 41a. By refusing to consider this significant, racially dilutive impact, the district court did not simply "cut directly to the dispositive question" (Bd. Br. 33) of the Board's intent. Rather, it excluded important evidence from its inquiry into that question. In light of appellee's burden of persuasion, see *Georgia* v. *United States*, 411 U.S. 526, 538 (1973), and the other strong indicia of discriminatory purpose in this case, that determination may well have made the difference in the district court's decision. The judgment therefore cannot stand. See *Pullman-Standard* v. *Swint*, 456 U.S. 273, 292 (1982).

2. Appellee stresses purported inadequacies of the NAACP plan proposed to the Board by appellant-intervenor Price (Bd. Br. 2, 40-41, 47-48), and contends that "[t]he Board was offered a choice between two alternative redistricting plans." *Id.* at 40. The proper inquiry in this case, however, is whether the electoral plan that the Board *did* adopt—the Police Jury plan—was selected because of its foreseeable adverse effects on African-American voters. The merit of the NAACP plan is not presented in this case, nor was that plan the only other alternative available to the Board when it made the decision at issue here.

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denied appellee's motion to supplement the record to include these election results. 116 S. Ct. 1540 (1996). Without being tested and placed in context, they can have little or no probative significance. They have not, for example, been subjected to the kind of expert analysis of racial polarization and turnout that the parties conducted regarding previous elections, see J.S. App. 122a-127a, and there has been no exploration of special circumstances that might bear on their probative value—including, for example, whether the pending litigation itself had any impact on the elections. See *Gingles*, 478 U.S. at 75-76 & n.37.

The Board had initially refused to adopt the Police Jury's 1991 plan, even though that plan had received Section 5 preclearance. Instead, it proceeded without haste to develop its own independent plan. That action was understandable; it is undisputed that the Police Jury and the School Board generally have different redistricting interests, and that ample time remained for the Board to draw its own plan before its first post-census election in 1994. J.S. App. 4a; *id.* at 72a (¶ 24). But as soon as the local NAACP presented its proposal, the Board abruptly changed course. *Id.* at 96a-101a. At the very next Board meeting after the NAACP presented its proposal (two years before the next election), the Board passed a motion of intent to adopt the Police Jury plan, which contains no majority-black districts. That plan made no attempt to accommodate School Board members' "typical[] concern[] with having a public school or schools in each district." *Id.* at 73a (¶ 24), 112a (¶ 141).[7] It also "wreaked havoc with the incumbencies of four of the School Board members." *Id.* at 28a. The Board's precipitate decision to adopt a plan that disserved its usual redistricting goals supports a strong inference of discriminatory purpose. See *Arlington Heights*, 429 U.S. at 267 & n.17.

Appellee is thus incorrect in stating (Bd. Br. 40) that "[t]he Board was offered a choice between two alternative redistricting plans." Given the significant length of time before the next election, one would expect the Board to have continued the process on which it had initially embarked and explored other alternatives to the Police Jury plan. See *Arlington Heights*, 429 U.S. at 267 ("De-

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[7] Appellee derides this concern as "appellants[']] newly-discovered 'a school building in every district' rule." Bd. Br. 49 n.34. But it was the School Board itself that stipulated to the consideration's importance. See J.S. App. 73a (¶ 24).

partures from the normal procedural sequence also might afford evidence that improper purposes are playing a role."). Those alternatives might have involved different configurations for drawing two majority-black districts in Bossier Parish. They also might have included plans drawing a single majority-black district; the parties have stipulated that it was "obvious" that a reasonably compact black-majority district could be drawn within Bossier City. J.S. App. 76a (¶ 36).[8] The Board was not required to adopt the NAACP plan or any particular alternative; nor does the mere "failure to maximize" majority-minority districts (Bd. Br. 42) establish a discriminatory purpose. Under the facts of this case, however, the Board's decision immediately to enact the Police Jury plan when presented with the NAACP proposal, and its sudden abandonment of its legitimate search for alternative plans, strongly suggest that the Board adopted the Police Jury plan for an impermissible reason. See *Arlington Heights*, 429 U.S. at 267.

The context of the Board's decision also makes clear the pretextual nature of the Board's assertion that its action was required by a state law against splitting precincts. As we explained in our opening brief (Br. 9 n.6), precincts are purely administrative units designed for the management of elections. The district court found that from the start of the redistricting process the Board "likely anticipated the necessity of splitting some precincts." J.S. App.

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[8] Appellee urges the Court to disregard this stipulation (Bd. Br. 48 n.33), arguing that it is inconsistent with the record developed at trial. Trial in this case was limited, at the district court's suggestion, to two days only, and the live testimony consisted solely of cross-examination—the parties were restricted to submitting direct testimony in written, narrative form. Given these constraints on proof, the United States should not be penalized for failing to present additional evidence of facts to which appellee had already stipulated.

29a. The Board's own redistricting consultant provided the Board members with precinct maps and instructed them that they "would have to work with the Police Jury to alter the precinct lines." *Id.* at 95a (¶ 89). Had the Board done so, its plan would have constituted neither a "violation[]" nor an "eva[sion]" (Bd. Br. 44) of state law, for it is undisputed that the Police Jury had the power to redraw precincts. J.S. App. 6a-7a, 72a. Although the Police Jury had rejected the Board's initial overture for joint *redistricting* (Bd. Br. 45)—an action readily explainable by the two bodies' divergent districting interests—appellee has presented no evidence that the Board would have refused to cooperate in altering *precinct* lines to accommodate whatever districts the Board drew.[9] Nor has appellee explained why the Board did not even approach the Police Jury to determine whether it would cooperate. The dictates of state law simply do not explain the Board's abrupt decision to adopt the Police Jury plan.

Nor can the Board's use of the Police Jury plan be explained by concerns regarding the cost of additional precincts. Contrary to appellee's contention (Bd. Br. 44-45), adopting a plan with two majority-black districts would not have required a significant increase in the number of precincts. Even if, as appellee now argues, adoption of such a plan would cut existing precinct lines in 65 places,[10] many areas cut out of those precincts could be

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[9] Appellee suggests (Bd. Br. 45) that the Police Jury had no incentive to cooperate *after* the Attorney General's objection to the Board 's plan, because doing so would have constituted an admission of the Police Jury's own liability. But the Police Jury's cooperation with the Board *at the time the Board redistricted* would have carried no such inference of admission.

[10] For this figure, appellee relies on Plaintiff's Exhibit 11, a table that was not the subject of testimony or other explanation below. On its face, however, the exhibit does not suggest that 65 new precincts

consolidated with each other or with existing precincts — an option that is permissible under Louisiana law. Def.-Int. Exh. G at 14. Throughout the redistricting process, the Police Jury anticipated consolidating precincts "as soon as practicable." J.S. App. 86a (¶ 61). Had the Board explored the possibility of precinct consolidation, it could have drawn a plan containing two majority-black districts with as few as 46 total precincts—3 precincts more than the 1990 total, and 10 precincts *fewer* than the Police Jury used in its 1991 redistricting plan. Def.-Int. Exh. G at 14-15. Such consolidations would have addressed any significant concern with increased costs.[11] The Board's failure even to examine the prospect of consolidation, and the Police Jury's own adoption of a redistricting plan that required the creation of 13 additional precincts, cast considerable doubt on appellee's asserted concern with electoral costs.

For similar reasons, appellee's suggestion (Bd. Br. 47-48) that the NAACP plan split three towns does not

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would need to be created under the NAACP plan. The exhibit identifies 65 precinct "cuts," but 13 of those "cuts" contain no population, and many others contain very small population totals. The "cuts" therefore could readily have been remedied by consolidation with other precincts.

[11] Appellee does not mention the availability of *consolidating* precincts—a procedure that reduces the number of precincts by joining them together for all purposes and thus saves the election costs that additional precincts would entail. See J.A. 171. Appellee instead refers to the possibility of allowing *separate* precincts to share polling places (Bd. Br. 45 n.31)—a distinct process that may reduce some election costs but does not reduce the number of precincts. Compare J.S. App. 85a-86a (¶ 61) (noting that the Board's redistricting consultant, Gary Joiner, was aware that changes could be made "to consolidate some precincts and thus reduce administrative costs"); with *id.* at 86a (¶ 62) (noting that "it was also Joiner's understanding" that "costs could be reduced by placing the machines and poll workers of two precincts at one polling place").

explain the Board's abrupt decision, when faced with that plan, to abandon its search for alternatives and adopt the Police Jury plan. One of the three towns—Haughton—was wholly unaffected by either majority-black district in the NAACP plan. See Def.-Int. Exh. 7, Map 3. The Board could thus have readily drawn two majority-black districts without splitting that town had it attempted to do so.[12] Moreover, the Police Jury plan, which the Board rushed to adopt, split the town of Benton (J.A. 102-103) and divided well-established, predominantly black neighborhoods within Bossier City. J.A. 102-104. Appellee's articulated rationale of avoiding the splitting of municipalities is pretextual.

In sum, the strongest evidence demonstrating the Board's purpose is not the Board's failure to adopt the NAACP plan but rather its decision to adopt the Police Jury plan—a plan it had already rejected as inconsistent with its districting interests—in circumstances suggesting a discriminatory motivation. As Judge Kessler found below,

> [t]he common-sense understanding of these events leads to one conclusion: The Board adopted the Police Jury plan—two years before the next election—in direct response to the presentation of a plan that created majority-black districts. Faced with growing frustration of the black community at being excluded from the electoral process, the only way for the School Board to ensure that no majority-black districts would be created was to quickly adopt the Police Jury plan and put the issue to rest.

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[12] The "Cooper 2" plan submitted by Defendant-Intervenors below included Haughton entirely within District 12. See Def.-Int. Exh. 25B.

J.S. App. 49a-50a. The district court's holding that appellee met its burden of proof,[13] notwithstanding this compelling evidence, was clear error.

3. We explained in our opening brief (Gov't Br. 33-44) that, when Section 2 was amended in 1982, Congress read this Court's decision in *Beer* v. *United States*, 425 U.S. 130 (1976), as requiring that electoral changes resulting in unlawful vote dilution not be precleared. In *Beer*, 425 U.S. at 141, the Court concluded that a nonretrogressive redistricting plan could not violate the "effect" prong of Section 5 "unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution." In noting the possibility that "a legislative reapportionment could be a substantial improvement over its predecessor in terms of lessening racial discrimination, and yet nonetheless continue so to discriminate on the basis of race or color as to be unconstitutional," the Court cited, *inter alia*, the vote dilution cases culminating in *White* v. *Regester*, 412 U.S. 755 (1973). See *Beer*, 425 U.S. at 142-143 n.14. In the 1982 amendments, Congress reinstated what it understood to be *White*'s "results" test as the standard governing Section 2 claims. See *Gingles*, 478 U.S. at 43-44 & n.8.

Congress reasonably read the Court's decision in *Beer* to require the conclusion that changed voting systems violative of amended Section 2's "results" standard could not be precleared under Section 5—whether because a discriminatory "result" constituted a form of discriminatory "effect" under Section 5, or because the equitable

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[13] A covered jurisdiction in a Section 5 declaratory judgment action has the burden of proving, *inter alia*, that its voting changes were not adopted for a discriminatory purpose. *Georgia* v. *United States*, 411 U.S. 526, 538 (1973). As a consequence, even if the evidence were in equipoise with respect to the question of discriminatory purpose, the district court would have been obligated to deny Section 5 preclearance.

remedy of preclearance could not be invoked in aid of a proven violation of anti-discrimination law. See Gov't Br. 34-35. The Senate Report made Congress's understanding on this point explicit by quoting *Beer*'s discussion and concluding that "[i]n light of the amendment to Section 2, it is intended that a Section 5 objection also follow if a new voting procedure itself so discriminates as to violate Section 2." S. Rep. No. 417, 97th Cong., 2d Sess. 12 n.31 (1982). The Attorney General's Procedures for the Administration of Section 5 incorporate Congress's understanding by requiring a denial of preclearance where "a bar to implementation of the change is necessary to prevent a clear violation of amended section 2." 28 C.F.R. 51.55(b)(2).[14]

The Senate Report makes clear that Congress viewed *Beer* as *already* incorporating a prohibition of unlawful vote dilution into Section 5. It is therefore simply irrelevant that, as appellee repeatedly observes (Bd. Br. 13, 14, 15, 22 & n.17), Congress did not alter the language of Section 5 itself in 1982 to provide expressly that a Section 2 "results" violation requires a denial of preclearance. Congress need not alter the language of a statutory provision when, as here, it agrees with a prior judicial

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[14] Appellee contends (Bd. Br. 22-23 n.18) that this regulation is not entitled to deference. This Court, however, has accorded "particular deference" to the interpretations of the Voting Rights Act set forth in the Procedures for the Administration of Section 5. *Dougherty County Bd. of Educ.* v. *White*, 439 U.S. 32, 39 (1978); see *Georgia* v. *United States*, 411 U.S. 526, 536-539 (1973); see also *Morse* v. *Republican Party of Virginia*, 116 S. Ct. 1186, 1193-1197 (1996) (plurality opinion) (applying Attorney General's regulation relating to Section 5 coverage of political parties). Nor is the regulation—which interprets Section 5's prohibition on voting changes "hav[ing] the effect of denying or abridging the right to vote on account of race," 42 U.S.C. 1973c, to encompass changes that "result" in discriminatory vote dilution—unreasonable or contrary to the plain text of the statute. See generally *Chevron U.S.A. Inc.* v. *National Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

gloss on that provision. To the contrary, "[w]hen a Congress that re-enacts a statute voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation, and this Court is bound thereby." *United States* v. *Board of Comm'rs*, 435 U.S. 110, 134 (1978).[15]

Appellee incorrectly contends (Bd. Br. 20) that the *Beer* language quoted in the Senate Report "simply makes the obvious point that intentionally discriminatory action is prohibited by Section 5."[16] The *Beer* Court's discussion of a change that "itself so discriminates * * * as to violate the Constitution," *Beer*, 425 U.S. at 141, and its discussion of the ways in which a change might violate that standard, *id.* at 142-143 n.14, would have been a highly circuitous way of making the obvious point that Section 5's text prohibits changes with the "purpose" of denying or abridging the right to vote.[17] Moreover, by noting that an

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[15] By contrast, the 1982 amendments did alter the text of the "bailout" provisions in Section 4(b) of the Act, 42 U.S.C. 1973b(b), to provide expressly that a covered jurisdiction could not exempt itself from Section 5's preclearance requirement unless it had eliminated "all voting procedures and methods of election which inhibit or dilute equal access to the electoral process." 42 U.S.C. 1973b(F)(i). This amendment was necessary because—unlike in the case of Section 5—prior interpretation of Section 4 did not allow bailout to be denied on the basis of unlawful vote dilution. S. Rep. No. 417, 97th Cong., 2d Sess. 43-45 (1982).

[16] Appellee also notes (Br. 20) that Justice Marshall, dissenting in *Beer*, vigorously argued that the *White* v. *Regester* standard should apply. But Justice Marshall—like Congress—read the majority opinion in *Beer* as ultimately holding that preclearance should be withheld where a change violates *White*'s "results" test. See *Beer*, 425 U.S. at 153-155.

[17] The question of discriminatory purpose was not at issue in *Beer* because the three-judge court had denied preclearance based solely on Section 5's "effect" prong. See *Beer*, 425 U.S. at 136 n.7.

ameliorative plan could "*continue so to discriminate* on the basis of race or color as to be unconstitutional," *id.* at 142 n.14 (emphasis added), the Court focused on the continuing *operation* of the redistricting plan, rather than on the discrete *intent* underlying its enactment. In light of that language, Congress reasonably concluded that *Beer* required that preclearance be denied where a change violated *White*'s "results" test. The Senate Report—the "authoritative source" for determining Congress's intent in enacting the 1982 amendments, *Gingles*, 478 U.S. at 43 n.7—makes clear that Congress read *Beer* in this way.

Nor would the result be different if Congress erred in interpreting the *Beer* decision; where Congress acts to codify its understanding of prevailing case law, that understanding is controlling for purposes of subsequent statutory construction. "Whether that understanding of Congress was in some ultimate sense incorrect is not what is important * * *. For the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was." *Brown* v. *General Services Administration*, 425 U.S. 820, 828 (1976).

Appellee invokes the "rule of statutory construction that if Congress intends to alter the usual constitutional balance between States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." Bd. Br. 24 (quoting *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) (internal quotation marks omitted)). The language of the Voting Rights Act, however, does make "unmistakably clear" that it alters the "usual constitutional balance" by subjecting covered jurisdictions like Bossier Parish to the requirements of Section 5, and by requiring all States and political subdivisions to comply with Section 2. Because Bossier Parish is clearly subject to the restrictions of

both Section 2 and Section 5, the denial of preclearance to one of its voting changes that violates Section 2 does not work any further alteration of the constitutional balance. Indeed, given the substantial overlap in the factors relevant to discriminatory purpose and the factors relevant to a Section 2 violation, much if not all of the evidence necessary to a Section 2 inquiry will necessarily be before the Section 5 court in any event. Compare *Gingles*, 478 U.S. at 43-51 (factors relevant to establishing Section 2 violation), with *Rogers*, 458 U.S. at 622-627 (factors relevant to establishing purposeful vote dilution). It would thus be quite anomalous if Congress intended to require preclearance even when a Section 2 violation is fully established in the Section 5 proceedings. See *Morse* v. *Republican Party of Virginia*, 116 S. Ct. 1186, 1201 (1996) (plurality opinion).[18]

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[18] Appellee suggests (Bd. Br. 14, 19) that a three-judge district court lacks subject matter jurisdiction to consider Section 2 issues. Even if appellee were correct that a Section 2 claim may not form the basis for jurisdiction in the three-judge court, nothing in the statute prevents the court from considering the Section 2 results standard in the course of adjudicating a Section 5 action over which it concededly has jurisdiction. Moreover, appellee is incorrect. Jurisdiction to enforce Section 2 is provided by Section 12(f) of the Voting Rights Act, 42 U.S.C. 1973j(f), which vests subject matter jurisdiction in the "district courts of the United States," without limitation. Indeed, Section 2 challenges to statewide reapportionments *must* be brought in three-judge district courts. See 28 U.S.C. 2284(a). And this Court has affirmed the assertion of jurisdiction by the three-judge District Court for the District of Columbia to issue injunctions against the implementation of unprecleared voting changes—even though the same provision of Section 12 provides jurisdiction for such Section 5 enforcement actions, and even though *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 560 (1969), held that such actions may be brought in the district in which the change is implemented. See *Texas* v. *United States*, No. 94-1529 (D.D.C. Sept. 27, 1994) (three-judge court), summarily aff'd, 115 S. Ct. 1397 (1995).

Finally, there is no merit to appellee's contention (Bd. Br. 10-13) that this Court's decisions in *Shaw II* and *Miller* held that a violation of Section 2 does not warrant the denial of preclearance. In each of those cases, the Attorney General's Section 5 objection was based solely on a claim of discriminatory purpose. See *Shaw II*, 116 S. Ct. at 1904; *Miller*, 115 S. Ct. at 2492. While the Court expressed "doubt that a showing of discriminatory effect under § 2, alone, could support a claim of discriminatory *purpose* under § 5," *Shaw II*, 116 S. Ct. at 1905 n.6 (emphasis added), the Court has never addressed the question whether a violation of amended Section 2 provides a ground for denying preclearance under the "effect" prong of Section 5, or as a bar to a Section 5 equitable remedy. See *City of Lockhart* v. *United States*, 460 U.S. 125, 133 n.9 (1983) (declining to address that question). Nor would denying preclearance on the basis of a Section 2 violation codify the "maximization policy" that this Court condemned in *Shaw II* and *Miller*. Cf. Bd. Br. 12. Section 2, by definition, does not require maximization. See *Johnson* v. *DeGrandy*, 114 S. Ct. 2647, 2660 (1994) ("Failure to maximize cannot be the measure of § 2."). Preclearance may not be denied under Section 2's "results" test unless the detailed preconditions for such a violation are established and, in the totality of the circumstances, it is shown that minority voters in the jurisdiction lack an equal opportunity to participate in the political process and to elect representatives of their choice. See 114 S. Ct. at 2654-2663.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the district court should be reversed and the case remanded for entry of a declaratory judgment that the redistricting plan at issue here is not

entitled to preclearance under Section 5. In the alternative, the judgment should be reversed and the case remanded for further proceedings to consider, under proper legal standards, the evidence concerning discriminatory purpose and the plan's compliance with Section 2.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

OCTOBER 1996

Supreme Court, U.S.
FILED
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(11) (10)

Nos. 95-1455 and 95-1508

In the Supreme Court of the United States

OCTOBER TERM, 1996

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, APPELLANT

v.

BOSSIER PARISH SCHOOL BOARD

GEORGE PRICE, ET AL., APPELLANTS

v.

BOSSIER PARISH SCHOOL BOARD

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE FEDERAL APPELLANT

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1. As we explained in our opening brief, the district court improperly refused to consider both the racially dilutive impact of the redistricting plan that the Bossier Parish School Board (Board) adopted and the Board's history of discrimination—two important types of circumstantial evidence bearing on the Board's purpose. See *Rogers* v. *Lodge*, 458 U.S. 613, 618, 623-626 (1982). With respect to evidence of a historical pattern of discrimination, appellee contends (Bd. Br. 29) that this Court in

Shaw v. *Hunt*, 116 S. Ct. 1894 (1996) (*Shaw II*), and *Miller* v. *Johnson*, 115 S. Ct. 2475 (1995), "viewed as irrelevant" a covered jurisdiction's "well-documented history of racial discrimination." That contention is plainly incorrect. In each of those cases, the Court concluded that the particular record before the three-judge district court did not support an inference of discriminatory purpose. See *Miller*, 115 S. Ct. at 2492; *Shaw II*, 116 S. Ct. at 1904. It did *not* reject the well-established line of precedent holding that evidence of past racial discrimination is directly relevant to a governmental actor's motivation in adopting a challenged policy. See, *e.g.*, *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 267 (1977) (factors relevant to the purpose inquiry include the "historical background of the decision"—"particularly if it reveals a series of official actions taken for invidious purposes"); *Rogers*, 458 U.S. at 624-625 ("Evidence of historical discrimination is relevant to drawing an inference of purposeful discrimination."); *Busbee* v. *Smith*, 549 F. Supp. 494 (D.D.C. 1982), aff'd, 459 U.S. 1166 (1983) (same); *City of Pleasant Grove* v. *United States*, 568 F. Supp. 1455, 1458 (D.D.C. 1983) (same).

With respect to the dilutive effect of the challenged plan, appellee first contends (Bd. Br. 32-33) that "the district court quite clearly, thoroughly and directly considered the adopted redistricting plan's effect on minority voters," and later suggests (*id.* at 33, 35) that the district court simply presumed that the Police Jury plan adopted by the Board had a dilutive impact. Both of those contentions are incorrect. As to the former, appellees cannot point to *any* discussion of the plan's dilutive impact in the majority opinion below. As to the latter, the district court nowhere presumed that appellee's plan had a dilutive effect on minority voters.

Appellee states (Bd. Br. 33, 34, 35, 36) that "it is assumed, due to the racial polarization and prior discrimination that renders the jurisdiction subject to Section 5 preclearance, that such racially-charged electoral conditions exist and white majority districts will thus have a foreseeable impact." The district court, however, expressly declined to consider such "section 2 evidence" (J.S. App. 23a, 24a), [1] and thus eliminated from its analysis an important category of evidence.[2]

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[1] Contrary to appellee's suggestion, moreover, racially-polarized voting patterns are not among the factors that trigger Section 5 coverage. See 42 U.S.C. 1973b(b).

[2] Appellee places substantial reliance (Bd. Br. 6, 8, 27, 28, 31) on the district court's statement that it did not consider "evidence relevant *only* to the section 2 inquiry." J.S. App. 9a n.6 (emphasis added). The district court, however, clearly refused to address any evidence regarding the dilutive impact of the Board's redistricting plan—a category of evidence that this Court has held to be relevant to the issue of discriminatory purpose, as well as to Section 2. See *Rogers* v. *Lodge*, *supra*.

Appellee also contends (Bd. Br. 30-31, 32 n.25) that the United States had "drawn a clear distinction between 'section 2 evidence' [such as evidence of racial bloc voting] and evidence 'independently relevant' to Section 5 purposes [such as evidence of historical discrimination]." Bd. Br. 32 n.25. We drew no such distinction. The heading of the relevant section of our post-trial brief made clear our position that "[t]he Section 2 evidence presented in this case is independently relevant to material issues outside the Section 2 inquiry." Gov't Post-Trial Brief at 36. In any event, the district court clearly did not limit its exclusion of "section 2 evidence" to evidence of racial bloc voting, nor would that limited exclusion have been warranted given the relevance of bloc voting to the question of foreseeable discriminatory effects. See, *e.g.*, *City of Port Arthur* v. *United States*, 517 F. Supp. 987, 1022 (D.D.C. 1981) (three-judge court) ("Knowing that City politics were seriously polarized by race, the officials responsible for developing the [challenged electoral] plan must have realized the improbability of the black population electing more than one candidate of its choice."), aff'd, 459 U.S. 159 (1982).

Appellee suggests (Bd. Br. 33) that a court is under no obligation to consider evidence that a redistricting plan has a racially discriminatory impact if the court "cut[s] directly to the dispositive question" of what actually motivated the decisionmaker. In appellee's view, evidence of vote dilution "tells us *why* a black majority district is *needed* to elect black candidates, but it says nothing about *why* a black majority district was *not created*." *Id.* at 34-35. This Court has squarely rejected that proposition.

Government officials rarely provide direct evidence of their discriminatory intentions. Because the Voting Rights Act is "aimed at the subtle[] as well as the obvious" discriminatory voting practices, *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 565 (1969), courts must conduct "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266. This Court has repeatedly held that evidence of an action's discriminatory impact is an important category of circumstantial evidence bearing on intent. See, *e.g.*, *Rogers*, 458 U.S. at 623-624; *Washington* v. *Davis*, 426 U.S. 229, 242 (1976); *City of Mobile* v. *Bolden*, 446 U.S. 55, 70 (1980); *Pullman-Standard* v. *Swint*, 456 U.S. 273, 289 & n.18 (1982); *Columbus Bd. of Educ.* v. *Penick*, 443 U.S. 449, 464-465 (1979).

"Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds." *Washington* v. *Davis*, 426 U.S. at 253 (Stevens, J., concurring). Accordingly, a governmental action with foreseeably harmful effects on a discrete group supports an inference that those effects were intended. See *Personnel Admin.* v. *Feeney*, 442 U.S. 256, 279 n.25 (1979) (where adverse consequences of a law on an identifiable group are inevita-

ble, "a strong inference that the adverse effects were desired can reasonably be drawn").

In adjudicating purposeful dilution cases, the courts have thus looked to whether a districting plan's discriminatory effect was understood by, or foreseeable to, the governmental body that enacted it. See, *e.g.*, *Garza* v. *County of Los Angeles*, 918 F.2d 763, 768 n.1 (9th Cir. 1990), cert. denied, 498 U.S. 1028 (1991); *Rybicki* v. *State Bd. of Elections*, 574 F. Supp. 1082, 1108-1109 (N.D. Ill. 1982) (three-judge court). The mere existence of a history of discrimination and a present discriminatory effect does not ordinarily compel a finding of discriminatory purpose. But see *Arlington Heights*, 429 U.S. at 266 ("Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action."); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 342 n.23 (1977) (observing, in a Title VII case, that "the company's inability to rebut the inference of discrimination came not from a misuse of statistics, but from the inexorable zero") (internal quotation marks omitted); *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886). Such evidence, however, is highly relevant to the intent inquiry. Here, the district court erred in refusing to consider how the Board's awareness of the dilutive impact of the Police Jury plan bore on the question of intent.

Contrary to appellee's contention (Bd. Br. 28-30), this Court's decisions in *Shaw II* and *Miller* are consistent with that principle. In those cases, the Court deemed "insupportable" the Attorney General's decision to interpose Section 5 objections to particular congressional redistricting plans. *Shaw II*, 116 S. Ct. at 1904; *Miller*, 115 S. Ct. at 2492. In neither case did the Court refuse to consider the effect of the redistricting plan at issue on minority voters. To the contrary, in each case the Court emphasized that the plan initially adopted by the legisla-

ture was ameliorative—that is, that the plan would have improved the opportunity for minority voters to elect their chosen candidates—and that there was no other "evidence of an intent to discriminate against minority voters." *Miller*, 115 S. Ct. at 2483; see *Shaw II*, 116 S. Ct. at 1904; *Miller*, 115 S. Ct. at 2492-2493.[3] The Court thus concluded that the only possible basis for the Attorney General's objections must have been the States' simple failure to draw as many majority-minority districts as possible—a basis the Court found insufficient to warrant a finding of discriminatory purpose. See *Shaw II*, 116 S. Ct. at 1904; *Miller*, 115 S. Ct. at 2492. Here, by contrast, the plan adopted by the Board perpetuated the dilutive impact of the prior plan—under which no black candidate had ever been elected. See J.S. App. 115a-116a (¶¶ 153-157).[4] Selection of the Police Jury plan was intended to ensure that the existing dilution of minority voting strength would continue.

Appellee also contends (Bd. Br. 3; emphasis omitted) that "[t]here is no competent evidence of racial bloc voting in any local Bossier Parish elections." That is untrue. A

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[3] Indeed, in concluding that North Carolina's rejection of an alternative plan did not reflect a discriminatory purpose, the Court specifically relied on evidence that the State believed the alternative plan to be *less* protective of minority voting strength than the ameliorative plan that it adopted. See *Shaw II*, 116 S. Ct. at 1904 (quoting statement in State's Section 5 submission that the second majority-minority district in the alternative plan "'did not have an effective minority voting majority' because it 'depended on the cohesion of black and Native American voters, and no such pattern was evident' and 'this plan dramatically decreased black influence' in four other districts").

[4] The Board's plan reduced the African-American voting-age population (VAP) in each of the two districts with the largest black VAP concentrations—from 42.1% to 40.9% in District Four and from 36.9% to 36.1% in District Seven. J.A. 44, 47.

regression analysis of the only interracial parish-wide race for local office in recent years (the 1988 primary election for the 26th Judicial District Court) revealed a high degree of racial polarization: the analysis estimated that 79.2% of black voters supported the unsuccessful African-American candidate, while only 28.9% of white voters did so. J.S. App. 122a-123a (¶¶ 183-184); J.A. 113-115. It is appropriate to consider the results in such "exogenous" parish-wide elections where, as here, many districts contain too few precincts to perform a reliable ecological regression analysis for elections that are held in individual districts. See generally J.A. 114-121.[5] The parties stipulated, moreover, that "[o]f the 14 elections since 1980 in which black candidates have run against white candidates for a single-member district or for mayor, only two candidates have won." J.S. App. 127a (¶ 196).[6]

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[5] See *Westwego Citizens for Better Gov't* v. *City of Westwego*, 872 F.2d 1201, 1208-1210 (5th Cir. 1989); *Citizens for a Better Gretna* v. *City of Gretna*, 834 F.2d 496, 502 (5th Cir. 1987) (concluding that *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), "suggests flexibility in the face of sparse data"), cert. denied, 492 U.S. 905 (1989).

[6] Those two candidates (Jerome Darby in Police Jury District 10 and Jeff Darby in Bossier City Council District 2) were elected under unique circumstances that do not detract from the broader pattern of racially-polarized voting in Bossier Parish. See *Gingles*, 478 U.S. at 57. Those candidates were elected in districts that included substantial areas surrounding Barksdale Air Force Base—an atypical factor that reduced the racial polarization and increased comparative African-American voter turnout in those districts. J.S. App. 2a n.1, 117a-118a (¶¶ 160-164), 120a (¶ 172), 127a (¶ 196). When that unique factor no longer obtained following the post-1990 census redistricting, Jeff Darby lost his seat to a white challenger. *Id.* at 120a (¶ 173). (Jerome Darby was not opposed for reelection. *Id.* at 118a-119a (¶ 165)). Nor do the results of the 1996 school board elections detract from the conclusion that significant polarization exists. Cf. Bd. Br. 5 & n.4. This Court

The record thus fully supports Judge Kessler's conclusion that the Board's adoption of the Police Jury plan "effectively excludes minority voters from the political process." J.S. App. 41a. By refusing to consider this significant, racially dilutive impact, the district court did not simply "cut directly to the dispositive question" (Bd. Br. 33) of the Board's intent. Rather, it excluded important evidence from its inquiry into that question. In light of appellee's burden of persuasion, see *Georgia* v. *United States*, 411 U.S. 526, 538 (1973), and the other strong indicia of discriminatory purpose in this case, that determination may well have made the difference in the district court's decision. The judgment therefore cannot stand. See *Pullman-Standard* v. *Swint*, 456 U.S. 273, 292 (1982).

2. Appellee stresses purported inadequacies of the NAACP plan proposed to the Board by appellant-intervenor Price (Bd. Br. 2, 40-41, 47-48), and contends that "[t]he Board was offered a choice between two alternative redistricting plans." *Id.* at 40. The proper inquiry in this case, however, is whether the electoral plan that the Board *did* adopt—the Police Jury plan—was selected because of its foreseeable adverse effects on African-American voters. The merit of the NAACP plan is not presented in this case, nor was that plan the only other alternative available to the Board when it made the decision at issue here.

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denied appellee's motion to supplement the record to include these election results. 116 S. Ct. 1540 (1996). Without being tested and placed in context, they can have little or no probative significance. They have not, for example, been subjected to the kind of expert analysis of racial polarization and turnout that the parties conducted regarding previous elections, see J.S. App. 122a-127a, and there has been no exploration of special circumstances that might bear on their probative value—including, for example, whether the pending litigation itself had any impact on the elections. See *Gingles*, 478 U.S. at 75-76 & n.37.

The Board had initially refused to adopt the Police Jury's 1991 plan, even though that plan had received Section 5 preclearance. Instead, it proceeded without haste to develop its own independent plan. That action was understandable; it is undisputed that the Police Jury and the School Board generally have different redistricting interests, and that ample time remained for the Board to draw its own plan before its first post-census election in 1994. J.S. App. 4a; *id.* at 72a (¶ 24). But as soon as the local NAACP presented its proposal, the Board abruptly changed course. *Id.* at 96a-101a. At the very next Board meeting after the NAACP presented its proposal (two years before the next election), the Board passed a motion of intent to adopt the Police Jury plan, which contains no majority-black districts. That plan made no attempt to accommodate School Board members' "typical[] concern[] with having a public school or schools in each district." *Id.* at 73a (¶ 24), 112a (¶ 141).[7] It also "wreaked havoc with the incumbencies of four of the School Board members." *Id.* at 28a. The Board's precipitate decision to adopt a plan that disserved its usual redistricting goals supports a strong inference of discriminatory purpose. See *Arlington Heights*, 429 U.S. at 267 & n.17.

Appellee is thus incorrect in stating (Bd. Br. 40) that "[t]he Board was offered a choice between two alternative redistricting plans." Given the significant length of time before the next election, one would expect the Board to have continued the process on which it had initially embarked and explored other alternatives to the Police Jury plan. See *Arlington Heights*, 429 U.S. at 267 ("De-

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[7] Appellee derides this concern as "appellants[']] newly-discovered 'a school building in every district' rule." Bd. Br. 49 n.34. But it was the School Board itself that stipulated to the consideration's importance. See J.S. App. 73a (¶ 24).

partures from the normal procedural sequence also might afford evidence that improper purposes are playing a role."). Those alternatives might have involved different configurations for drawing two majority-black districts in Bossier Parish. They also might have included plans drawing a single majority-black district; the parties have stipulated that it was "obvious" that a reasonably compact black-majority district could be drawn within Bossier City. J.S. App. 76a (¶ 36).[8] The Board was not required to adopt the NAACP plan or any particular alternative; nor does the mere "failure to maximize" majority-minority districts (Bd. Br. 42) establish a discriminatory purpose. Under the facts of this case, however, the Board's decision immediately to enact the Police Jury plan when presented with the NAACP proposal, and its sudden abandonment of its legitimate search for alternative plans, strongly suggest that the Board adopted the Police Jury plan for an impermissible reason. See *Arlington Heights*, 429 U.S. at 267.

The context of the Board's decision also makes clear the pretextual nature of the Board's assertion that its action was required by a state law against splitting precincts. As we explained in our opening brief (Br. 9 n.6), precincts are purely administrative units designed for the management of elections. The district court found that from the start of the redistricting process the Board "likely anticipated the necessity of splitting some precincts." J.S. App.

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[8] Appellee urges the Court to disregard this stipulation (Bd. Br. 48 n.33), arguing that it is inconsistent with the record developed at trial. Trial in this case was limited, at the district court's suggestion, to two days only, and the live testimony consisted solely of cross-examination—the parties were restricted to submitting direct testimony in written, narrative form. Given these constraints on proof, the United States should not be penalized for failing to present additional evidence of facts to which appellee had already stipulated.

29a. The Board's own redistricting consultant provided the Board members with precinct maps and instructed them that they "would have to work with the Police Jury to alter the precinct lines." *Id.* at 95a (¶ 89). Had the Board done so, its plan would have constituted neither a "violation[]" nor an "eva[sion]" (Bd. Br. 44) of state law, for it is undisputed that the Police Jury had the power to redraw precincts. J.S. App. 6a-7a, 72a. Although the Police Jury had rejected the Board's initial overture for joint *redistricting* (Bd. Br. 45)—an action readily explainable by the two bodies' divergent districting interests—appellee has presented no evidence that the Board would have refused to cooperate in altering *precinct* lines to accommodate whatever districts the Board drew.[9] Nor has appellee explained why the Board did not even approach the Police Jury to determine whether it would cooperate. The dictates of state law simply do not explain the Board's abrupt decision to adopt the Police Jury plan.

Nor can the Board's use of the Police Jury plan be explained by concerns regarding the cost of additional precincts. Contrary to appellee's contention (Bd. Br. 44-45), adopting a plan with two majority-black districts would not have required a significant increase in the number of precincts. Even if, as appellee now argues, adoption of such a plan would cut existing precinct lines in 65 places,[10] many areas cut out of those precincts could be

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[9] Appellee suggests (Bd. Br. 45) that the Police Jury had no incentive to cooperate *after* the Attorney General's objection to the Board 's plan, because doing so would have constituted an admission of the Police Jury's own liability. But the Police Jury's cooperation with the Board *at the time the Board redistricted* would have carried no such inference of admission.

[10] For this figure, appellee relies on Plaintiff's Exhibit 11, a table that was not the subject of testimony or other explanation below. On its face, however, the exhibit does not suggest that 65 new precincts

consolidated with each other or with existing precincts — an option that is permissible under Louisiana law. Def.-Int. Exh. G at 14. Throughout the redistricting process, the Police Jury anticipated consolidating precincts "as soon as practicable." J.S. App. 86a (¶ 61). Had the Board explored the possibility of precinct consolidation, it could have drawn a plan containing two majority-black districts with as few as 46 total precincts—3 precincts more than the 1990 total, and 10 precincts *fewer* than the Police Jury used in its 1991 redistricting plan. Def.-Int. Exh. G at 14-15. Such consolidations would have addressed any significant concern with increased costs.[11] The Board's failure even to examine the prospect of consolidation, and the Police Jury's own adoption of a redistricting plan that required the creation of 13 additional precincts, cast considerable doubt on appellee's asserted concern with electoral costs.

For similar reasons, appellee's suggestion (Bd. Br. 47-48) that the NAACP plan split three towns does not

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would need to be created under the NAACP plan. The exhibit identifies 65 precinct "cuts," but 13 of those "cuts" contain no population, and many others contain very small population totals. The "cuts" therefore could readily have been remedied by consolidation with other precincts.

[11] Appellee does not mention the availability of *consolidating* precincts—a procedure that reduces the number of precincts by joining them together for all purposes and thus saves the election costs that additional precincts would entail. See J.A. 171. Appellee instead refers to the possibility of allowing *separate* precincts to share polling places (Bd. Br. 45 n.31)—a distinct process that may reduce some election costs but does not reduce the number of precincts. Compare J.S. App. 85a-86a (¶ 61) (noting that the Board's redistricting consultant, Gary Joiner, was aware that changes could be made "to consolidate some precincts and thus reduce administrative costs"); with *id.* at 86a (¶ 62) (noting that "it was also Joiner's understanding" that "costs could be reduced by placing the machines and poll workers of two precincts at one polling place").

explain the Board's abrupt decision, when faced with that plan, to abandon its search for alternatives and adopt the Police Jury plan. One of the three towns—Haughton—was wholly unaffected by either majority-black district in the NAACP plan. See Def.-Int. Exh. 7, Map 3. The Board could thus have readily drawn two majority-black districts without splitting that town had it attempted to do so.[12] Moreover, the Police Jury plan, which the Board rushed to adopt, divided well-established, predominantly black neighborhoods within Bossier City and along the boundaries of the town of Benton. J.A. 102-104. Appellee's articulated rationale of avoiding the splitting of municipalities is pretextual.

In sum, the strongest evidence demonstrating the Board's purpose is not the Board's failure to adopt the NAACP plan but rather its decision to adopt the Police Jury plan—a plan it had already rejected as inconsistent with its districting interests—in circumstances suggesting a discriminatory motivation. As Judge Kessler found below,

> [t]he common-sense understanding of these events leads to one conclusion: The Board adopted the Police Jury plan—two years before the next election—in direct response to the presentation of a plan that created majority-black districts. Faced with growing frustration of the black community at being excluded from the electoral process, the only way for the School Board to ensure that no majority-black districts would be created was to quickly adopt the Police Jury plan and put the issue to rest.

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[12] The "Cooper 2" plan submitted by Defendant-Intervenors below included Haughton entirely within District 12. See Def.-Int. Exh. 25B.

J.S. App. 49a-50a. The district court's holding that appellee met its burden of proof,[13] notwithstanding this compelling evidence, was clear error.

3. We explained in our opening brief (Gov't Br. 33-44) that, when Section 2 was amended in 1982, Congress read this Court's decision in *Beer* v. *United States*, 425 U.S. 130 (1976), as requiring that electoral changes resulting in unlawful vote dilution not be precleared. In *Beer*, 425 U.S. at 141, the Court concluded that a nonretrogressive redistricting plan could not violate the "effect" prong of Section 5 "unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution." In noting the possibility that "a legislative reapportionment could be a substantial improvement over its predecessor in terms of lessening racial discrimination, and yet nonetheless continue so to discriminate on the basis of race or color as to be unconstitutional," the Court cited, *inter alia*, the vote dilution cases culminating in *White* v. *Regester*, 412 U.S. 755 (1973). See *Beer*, 425 U.S. at 142-143 n.14. In the 1982 amendments, Congress reinstated what it understood to be *White*'s "results" test as the standard governing Section 2 claims. See *Gingles*, 478 U.S. at 43-44 & n.8.

Congress reasonably read the Court's decision in *Beer* to require the conclusion that changed voting systems violative of amended Section 2's "results" standard could not be precleared under Section 5—whether because a discriminatory "result" constituted a form of discrimi-

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[13] A covered jurisdiction in a Section 5 declaratory judgment action has the burden of proving, *inter alia*, that its voting changes were not adopted for a discriminatory purpose. *Georgia* v. *United States*, 411 U.S. 526, 538 (1973). As a consequence, even if the evidence were in equipoise with respect to the question of discriminatory purpose, the district court would have been obligated to deny Section 5 preclearance.

natory "effect" under Section 5, or because the equitable remedy of preclearance could not be invoked in aid of a proven violation of anti-discrimination law. See Gov't Br. 34-35. The Senate Report made Congress's understanding on this point explicit by quoting *Beer*'s discussion and concluding that "[i]n light of the amendment to Section 2, it is intended that a Section 5 objection also follow if a new voting procedure itself so discriminates as to violate Section 2." S. Rep. No. 417, 97th Cong., 2d Sess. 12 n.31 (1982). The Attorney General's Procedures for the Administration of Section 5 incorporate Congress's understanding by requiring a denial of preclearance where "a bar to implementation of the change is necessary to prevent a clear violation of amended section 2." 28 C.F.R. 51.55(b)(2).[14]

The Senate Report makes clear that Congress viewed *Beer* as *already* incorporating a prohibition of unlawful vote dilution into Section 5. It is therefore simply irrelevant that, as appellee repeatedly observes (Bd. Br. 13, 14, 15, 22 & n.17), Congress did not alter the language of Section 5 itself in 1982 to provide expressly that a Section 2 "results" violation requires a denial of preclearance. Congress need not alter the language of a statutory

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[14] Appellee contends (Bd. Br. 22-23 n.18) that this regulation is not entitled to deference. This Court, however, has accorded "particular deference" to the interpretations of the Voting Rights Act set forth in the Procedures for the Administration of Section 5. *Dougherty County Bd. of Educ.* v. *White*, 439 U.S. 32, 39 (1978); see *Georgia* v. *United States*, 411 U.S. 526, 536-539 (1973); see also *Morse* v. *Republican Party of Virginia*, 116 S. Ct. 1186, 1193-1197 (1996) (plurality opinion) (applying Attorney General's regulation relating to Section 5 coverage of political parties). Nor is the regulation—which interprets Section 5's prohibition on voting changes "hav[ing] the effect of denying or abridging the right to vote on account of race," 42 U.S.C. 1973c, to encompass changes that "result" in discriminatory vote dilution—unreasonable or contrary to the plain text of the statute. See generally *Chevron U.S.A. Inc.* v. *National Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

provision when, as here, it agrees with a prior judicial gloss on that provision. To the contrary, "[w]hen a Congress that re-enacts a statute voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation, and this Court is bound thereby." *United States* v. *Board of Comm'rs*, 435 U.S. 110, 134 (1978).[15]

Appellee incorrectly contends (Bd. Br. 20) that the *Beer* language quoted in the Senate Report "simply makes the obvious point that intentionally discriminatory action is prohibited by Section 5."[16] The *Beer* Court's discussion of a change that "itself so discriminates * * * as to violate the Constitution," *Beer*, 425 U.S. at 141, and its discussion of the ways in which a change might violate that standard, *id.* at 142-143 n.14, would have been a highly circuitous way of making the obvious point that Section 5's text prohibits changes with the "purpose" of denying or

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[15] By contrast, the 1982 amendments did alter the text of the "bailout" provisions in Section 4(b) of the Act, 42 U.S.C. 1973b(b), to provide expressly that a covered jurisdiction could not exempt itself from Section 5's preclearance requirement unless it had eliminated "all voting procedures and methods of election which inhibit or dilute equal access to the electoral process." 42 U.S.C. 1973b(F)(i). This amendment was necessary because—unlike in the case of Section 5—prior interpretation of Section 4 did not allow bailout to be denied on the basis of unlawful vote dilution. S. Rep. No. 417, 97th Cong., 2d Sess. 43-45 (1982).

[16] Appellee also notes (Br. 20) that Justice Marshall, dissenting in *Beer*, vigorously argued that the *White* v. *Regester* standard should apply. But Justice Marshall—like Congress—read the majority opinion in *Beer* as ultimately holding that preclearance should be withheld where a change violates *White*'s "results" test. See *Beer*, 425 U.S. at 153-155.

abridging the right to vote.[17] Moreover, by noting that an ameliorative plan could "*continue so to discriminate* on the basis of race or color as to be unconstitutional," *id.* at 142 n.14 (emphasis added), the Court focused on the continuing *operation* of the redistricting plan, rather than on the discrete *intent* underlying its enactment. In light of that language, Congress reasonably concluded that *Beer* required that preclearance be denied where a change violated *White*'s "results" test. The Senate Report—the "authoritative source" for determining Congress's intent in enacting the 1982 amendments, *Gingles*, 478 U.S. at 43 n.7—makes clear that Congress read *Beer* in this way.

Nor would the result be different if Congress erred in interpreting the *Beer* decision; where Congress acts to codify its understanding of prevailing case law, that understanding is controlling for purposes of subsequent statutory construction. "Whether that understanding of Congress was in some ultimate sense incorrect is not what is important * * *. For the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was." *Brown* v. *General Services Administration*, 425 U.S. 820, 828 (1976).

Appellee invokes the "rule of statutory construction that if Congress intends to alter the usual constitutional balance between States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." Bd. Br. 24 (quoting *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) (internal quotation marks omitted)). The language of the Voting Rights Act, however, does make "unmistakably

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[17] The question of discriminatory purpose was not at issue in *Beer* because the three-judge court had denied preclearance based solely on Section 5's "effect" prong. See *Beer*, 425 U.S. at 136 n.7.

clear" that it alters the "usual constitutional balance" by subjecting covered jurisdictions like Bossier Parish to the requirements of Section 5, and by requiring all States and political subdivisions to comply with Section 2. Because Bossier Parish is clearly subject to the restrictions of both Section 2 and Section 5, the denial of preclearance to one of its voting changes that violates Section 2 does not work any further alteration of the constitutional balance. Indeed, given the substantial overlap in the factors relevant to discriminatory purpose and the factors relevant to a Section 2 violation, much if not all of the evidence necessary to a Section 2 inquiry will necessarily be before the Section 5 court in any event. Compare *Gingles*, 478 U.S. at 43-51 (factors relevant to establishing Section 2 violation), with *Rogers*, 458 U.S. at 622-627 (factors relevant to establishing purposeful vote dilution). It would thus be quite anomalous if Congress intended to require preclearance even when a Section 2 violation is fully established in the Section 5 proceedings. See *Morse* v. *Republican Party of Virginia*, 116 S. Ct. 1186, 1201 (1996) (plurality opinion).[18]

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[18] Appellee suggests (Bd. Br. 14, 19) that a three-judge district court lacks subject matter jurisdiction to consider Section 2 issues. Even if appellee were correct that a Section 2 claim may not form the basis for jurisdiction in the three-judge court, nothing in the statute prevents the court from considering the Section 2 results standard in the course of adjudicating a Section 5 action over which it concededly has jurisdiction. Moreover, appellee is incorrect. Jurisdiction to enforce Section 2 is provided by Section 12(f) of the Voting Rights Act, 42 U.S.C. 1973j(f), which vests subject matter jurisdiction in the "district courts of the United States," without limitation. Indeed, Section 2 challenges to statewide reapportionments *must* be brought in three-judge district courts. See 28 U.S.C. 2284(a). And this Court has affirmed the assertion of jurisdiction by the three-judge District Court for the District of Columbia to issue injunctions against the implementation of unprecleared voting changes—even though the same provision of

Finally, there is no merit to appellee's contention (Bd. Br. 10-13) that this Court's decisions in *Shaw II* and *Miller* held that a violation of Section 2 does not warrant the denial of preclearance. In each of those cases, the Attorney General's Section 5 objection was based solely on a claim of discriminatory purpose. See *Shaw II*, 116 S. Ct. at 1904; *Miller*, 115 S. Ct. at 2492. While the Court expressed "doubt that a showing of discriminatory effect under § 2, alone, could support a claim of discriminatory *purpose* under § 5," *Shaw II*, 116 S. Ct. at 1905 n.6 (emphasis added), the Court has never addressed the question whether a violation of amended Section 2 provides a ground for denying preclearance under the "effect" prong of Section 5, or as a bar to a Section 5 equitable remedy. See *City of Lockhart* v. *United States*, 460 U.S. 125, 133 n.9 (1983) (declining to address that question). Nor would denying preclearance on the basis of a Section 2 violation codify the "maximization policy" that this Court condemned in *Shaw II* and *Miller*. Cf. Bd. Br. 12. Section 2, by definition, does not require maximization. See *Johnson* v. *DeGrandy*, 114 S. Ct. 2647, 2660 (1994) ("Failure to maximize cannot be the measure of § 2."). Preclearance may not be denied under Section 2's "results" test unless the detailed preconditions for such a violation are established and, in the totality of the circumstances, it is shown that minority voters in the jurisdiction lack an equal opportunity to participate in the political process and to elect representatives of their choice. See 114 S. Ct. at 2654-2663.

Section 12 provides jurisdiction for such Section 5 enforcement actions, and even though *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 560 (1969), held that such actions may be brought in the district in which the change is implemented. See *Texas* v. *United States*, No. 94-1529 (D.D.C. Sept. 27, 1994) (three-judge court), summarily aff'd, 115 S. Ct. 1397 (1995).

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the district court should be reversed and the case remanded for entry of a declaratory judgment that the redistricting plan at issue here is not entitled to preclearance under Section 5. In the alternative, the judgment should be reversed and the case remanded for further proceedings to consider, under proper legal standards, the evidence concerning discriminatory purpose and the plan's compliance with Section 2.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

OCTOBER 1996

Supreme Court, U.S.
FILED
OCT 21 1996
CLERK

(12) (11)

Nos. 95-1455 & 95-1508

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OCTOBER TERM, 1996

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v.

BOSSIER PARISH SCHOOL BOARD,
Appellee.

On Appeal from the United States District Court for the District of Columbia

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REPLY BRIEF OF APPELLANTS GEORGE PRICE, ET AL.

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REPLY BRIEF OF APPELLANTS GEORGE PRICE, ET AL.

INTRODUCTION

In its brief to this Court, the Bossier Parish School Board now concedes that: (1) *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 426 U.S. 252 (1977), sets the legal standard for determining whether the Board adopted the Police Jury plan in part for a discriminatory purpose, B.P. Br. 29, 33, 36, 49;[1] (2) if the plan was adopted in part for a

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[1] In this brief, record citations conform to the abbreviations set forth in the Brief of Appellants George Price, *et al.*, at 1 n.1 (filed

discriminatory purpose, it violates Section 5 even though it may be nonretrogressive, *id.* at 10; and (3) in determining whether the plan was adopted in part for a discriminatory purpose, it would be "indefensible" for a court to ignore relevant evidence merely because that evidence would also be relevant to a Section 2 claim, *id.* at 31. Even though Bossier thereby acknowledges that appellants are right on the law with respect to the standards governing the "purpose" prong of Section 5, it does not and cannot show that it meets those standards. Instead, in its effort to defend the lower court's judgment, Bossier mischaracterizes the central issues before this Court, misstates the ruling of the majority below, and misrepresents the stipulated and unrebutted facts in the record.

For example, Bossier repeatedly mischaracterizes this case as one raising the question whether a governmental body unlawfully discriminates solely because it fails to *maximize* the number of majority-minority election districts. *See, e.g.*, B.P. Br. 6. In fact, the question is whether the Board adopted its plan in part to *minimize* the number of majority-minority districts and keep it at zero.

Likewise, this case does not ask this Court to choose between Bossier's plan and what it calls an "objectively inferior" maximizing alternative. *Id.* Instead, this case concerns the Board's refusal to consider *any* possible plan with even a single majority-minority district and its sudden adoption of a previously rejected and seriously flawed minimizing plan only when it was publicly confronted with the fact that majority-minority districts were a viable option.

August 1, 1996). Additional abbreviations are as follows: Brief of Appellee Bossier Parish ("B.P. Br."); Brief of Appellants George Price, *et al.* ("D-I Br."); and Jurisdictional Statement of Appellants George Price, *et al.* ("D-I J.S.").

In the end, the central question in this case is whether the Board met its burden to prove that its hasty reversal about the Police Jury plan was not motivated even in part by a discriminatory purpose. Applying the *Arlington Heights* standard—which all parties now acknowledge as controlling—to the stipulated and unrebutted facts, Section 5 preclearance should be denied because this "evidence demonstrates conclusively that the Bossier School Board acted with discriminatory purpose." App. 39a (Kessler, J., dissenting). Therefore, this Court should correct the majority's legal errors and reverse the decision below.

ARGUMENT

I. THE PURPOSE PRONG OF SECTION 5 IS DETERMINATIVE IN THIS CASE

Notwithstanding that Bossier spends the bulk of its brief arguing that a Section 2 violation should not be grounds for denying Section 5 preclearance, B.P. Br. 8-27, this Court need not reach that issue. This case has always been primarily a Section 5 discriminatory purpose case. The analysis of discriminatory purpose under *Arlington Heights* was the primary focus of all the briefing below. Indeed, the purpose evidence was so overwhelming that it was the *only* issue addressed in the Defendant-Intervenors' Post-Trial Brief.

All the parties agreed below, moreover, both that the court need not address Section 2 if Bossier "failed to meet its burden of proof on the issue of purpose" and, on the other hand, that it would make no sense to preclear a redistricting plan that violates Section 2. App. 144a (Stip. 257). We continue to support this position. *See* D-I Br. 43-45.

This Court, however, need not reach the Section 2 incorporation issue because the majority below failed to apply the proper legal standard to the evidence that

"demonstrates overwhelmingly" the Board's discriminatory purpose. App. 63a (Kessler, J., dissenting). Thus, if the Court agrees with us on the Section 5 purpose issue, the subsidiary Section 2 issue need not be decided. On the other hand, even if the Court decided the Section 2 incorporation issue against us, the discriminatory purpose issue would still have to be reached.

Furthermore, and contrary to Bossier's repeated contentions, addressing the purpose issue under *Arlington Heights* will not require this Court "indirectly" to decide the incorporation issue. B.P. Br. 6-7, 30-31. The overwhelming evidence of discriminatory purpose in this case does not hinge on the presence of a Section 2 violation or the Board's "failure to maximize." *Id.* at 7.

Instead, the evidence here—including direct admissions of discriminatory purpose, a discriminatory impact on minority voters, an ongoing history of discrimination, a failure to comply with stated redistricting criteria, and plainly pretextual *post hoc* rationalizations—unequivocally reveals that the Board adopted a previously rejected minimizing plan in direct response to the public debunking of its earlier claim that a majority-black district was impossible. Since Bossier adopted its plan in part for a discriminatory purpose, it should be denied preclearance, and the Board should be directed to develop a new plan free of such influences.

II. BOSSIER HAS CONCEDED THE LEGAL STANDARDS THAT GOVERN THE SECTION 5 PURPOSE PRONG

In its motion to dismiss this appeal, Bossier admitted that the majority below failed to apply *Arlington Heights* to the stipulated and unrebutted facts; Bossier argued then that a different legal standard should apply. Motion to Dismiss or Affirm at 11-12. Now, Bossier agrees that *Arlington Heights* applies. B.P. Br. 29, 33, 36, 49.

Indeed, our Jurisdictional Statement raised four questions regarding the legal standards applicable to the purpose prong of Section 5, D-I J.S. i., and Bossier now appears to agree with our position on all four. First, Bossier now *expressly* "agree[s] that courts - in Section 5 proceedings . . . should not exclude evidence probative of the legal question being resolved simply because it is also relevant to another legal issue." B.P. Br. 28. In fact, Bossier concedes that it is an "indefensible ruling that otherwise material evidence of purpose somehow should be excluded because it was also relevant to Section 2." *Id.* at 31. Second, Bossier acknowledges that this Court's decisions "in just the past two Terms" have confirmed that Section 5 preclearance must be denied even to an ameliorative plan, and certainly to a minimizing plan, if it is adopted with "an invidious purpose." *Id.* at 10 (citing *Miller v. Johnson*, 115 S. Ct. 2475 (1995)). Third, Bossier agrees that it bears the burden of proof under Section 5, *id.* at 8-9, implicitly acknowledging that the court itself should not provide its own arguments to meet that burden. Finally, in accepting *Arlington Heights* as the governing legal standard, Bossier also apparently acknowledges that if a discriminatory purpose was "a motivating factor" in its decision, preclearance should be denied. *Id.* at 29, 33, 36, 49; *Arlington Heights*, 465 U.S. at 265-66.

III. THE MAJORITY BELOW PLAINLY DID NOT APPLY THE GOVERNING STANDARDS

At the outset, we urge the Court to consider that in its motion to dismiss the Board *agreed* that the majority both refused to apply *Arlington Heights* and excluded from consideration all evidence relevant to Section 2. Motion to Dismiss or Affirm at i, 11-12. Now, however, Bossier has reversed course completely and contends that the majority *did* apply *Arlington Heights* and *did* consider certain Section 2 evidence, excluding only Section 2 evidence that would not be relevant to discriminatory purpose under Section 5. B.P. Br. 8, 27-39. A

party is not permitted to contradict itself in this fashion and raise for the first time in its responsive brief on the merits an argument it could have made in opposition to certiorari or in a motion to dismiss. *See Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2897 n.9 (1992); *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 815-16 (1985). Accordingly, the Court should not consider Bossier's new argument.

In any case, the argument is plainly without merit. To sustain its new view that the majority correctly applied *Arlington Heights* and considered all the relevant evidence, Bossier ignores both what the majority says it did as well as what it actually did. Relying now on a solitary footnote, Bossier claims that the majority's failure to apply *Arlington Heights* and its exclusion of "Section 2 evidence" were harmless, because it excluded from consideration solely that "evidence relevant *only* to the section 2 inquiry." B.P. Br. 27 (quoting App. 9a n.6) (emphasis added). Bossier, however, can cite no evidence introduced by appellants that is irrelevant to discriminatory purpose under *Arlington Heights*. Therefore, this footnote cannot save the majority's decision.

The text of the majority's opinion also makes clear that the majority considered any evidence that was relevant to Section 2 to be irrelevant to Section 5. In each of the three references in the text of the majority's opinion to its refusal to consider "section 2 evidence," the majority does not limit its discussion to evidence relevant "only" to Section 2. *See* D-I Br. 29 n.6 (quoting App. 23a-24a). Rather, the majority plainly and repeatedly explains that this evidence's relevance to Section 2 is *the reason* that it should not be considered in a Section 5 proceeding. App. 23a-24a. That is why the footnote relied on by Bossier must be read to mean that such evidence would not be considered under Section 5 because, in the majority's view, by definition it was "relevant only to the section 2 inquiry." *Id.* at 9a n.6. Moreover, when

Judge Kessler in dissent pointed out both the proper legal standard and the majority's refusal to apply it, App. 39a n.2, 42a n.4, the majority did not profess that it really was weighing *all* the evidence.

This reading of the majority's opinion is confirmed by what the majority actually did in excluding certain relevant evidence. It is also confirmed by Bossier's own laborious effort to demonstrate that the impact on minority voters of the Board's plan and Bossier's ongoing history of discrimination are insignificant in this case. B.P. Br. 3-5, 27-39. The majority's opinion, of course, says none of this, because the majority never considered such evidence.

For example, without citation to the majority's actual opinion, Bossier claims that "[t]he court assumed" that its plan negatively affected black voters' electoral opportunities but found that the Board adopted the plan "in spite of" that impact. *Id.* at 33. The majority did not say this and made no such assumption; not a sentence of the majority's opinion addresses the discriminatory impact of the Board's plan.

Bossier also suggests that the majority considered the Board's ongoing history of discrimination, but concluded that it was not particularly probative. B.P. Br. 36-38. Bossier again rests its claim principally on a single footnote taken out of context. *Id.* at 37 (citing App. 34a n.18). Even in this footnote, however, the majority stated that it did not "see how [Bossier's continuing willful failure to comply with school desegregation orders] can be in any way related to the School Board's purpose in adopting the Police Jury plan." App. 34a n.18. In contrast, Bossier itself now concedes that "'a series of official actions taken for invidious purposes'" is relevant to the question "whether this specific voting change was motivated by the same invidious purposes." B.P. Br. 36 (quoting *Arlington Heights*, 429 U.S. at 267). Moreover, the rest of the voluminous evidence of

discrimination in Bossier Parish and by the Board itself is never even mentioned by the majority. App. 42a n.4. (Kessler, J., dissenting).

In sum, it is implausible to conclude, as Bossier urges, that the majority silently applied *Arlington Heights* and actually considered the crucial "Section 2" evidence that it said it did not. Accordingly, the majority's resulting judgment is erroneous as a matter of law and should be set aside.

IV. BECAUSE UNDER THE GOVERNING STANDARDS THE RECORD LEAVES NO DOUBT THAT DISCRIMINATORY PURPOSE MOTIVATED THE BOARD'S ACTION, THIS COURT SHOULD REVERSE

Bossier's contention that this appeal is actually a "straightforward 'clearly erroneous' case," B.P. Br. 28, 39, is itself erroneous. The principal facts relevant to determining discriminatory purpose are not in dispute; they are stipulated and unrebutted. App. 66a-153a (Stip. 1-285); D-I Br. 5-23. The actual dispute here centers on the majority's legal errors in analyzing, and refusing to consider, the stipulated facts. Moreover, when analyzed under the governing legal standards, the actual facts of record permit only one conclusion: "racial purpose fueled the School Board's decision." App. 39a (Kessler, J., dissenting). For that reason, this Court should not merely vacate the majority's opinion; it should reverse and direct that preclearance be denied. *See United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 657 (1964); *Levin v. Mississippi River Fuel Corp.*, 386 U.S. 162, 169-70 (1967).

A. The Board Presented No Evidence of Any Non-Racial Reason to Reverse Itself and Adopt the Police Jury Plan

Throughout its brief, Bossier mischaracterizes the issue in this case as whether the Board had any legiti-

mate reason for rejecting the NAACP plan; the real issue, however, is whether the Board had any discriminatory purpose in adopting the plan it *did* adopt. *See* D-I Br. 38-40.

The Board initially rejected the Police Jury plan on September 5, 1991. App. 47a (Kessler, J., dissenting). As the majority found:

> The School Board did not like the Police Jury plan when it was first presented to them [after it already had been precleared on July 29, 1991, App. 58a], and there were certainly reasons not to. The Police Jury plan wreaked havoc with the incumbencies of four of the School Board members and was not drawn with school locations in mind. [App. 28a.]

The ultimate question, therefore, is why did the Board reverse its decision, and more specifically, did a discriminatory purpose contribute to that reversal?

Bossier asks this Court to assume that the two reasons it adopted the Police Jury plan were those relied on by the majority: "guaranteed preclearance" and "precinct-splitting." B.P. Br. 6 (quoting App. 27a-28a). But Bossier offered no *evidence* that those reasons actually motivated its reversal of position on the plan. Nor is this surprising. Preclearance certainly was no more likely in 1992 than it had been in 1991 when the Board *rejected* the Police Jury plan. And, concerns about precinct-splitting are not a reason *to adopt* the Police Jury plan at all but, at most, a reason—albeit pretextual (*see infra* pp. 18-20)—*to reject* the NAACP plan.

Turning to the actual evidence of record, the Board offered no real explanation for its adoption of the Police Jury plan. The Board's minutes reveal no discussion at all of the merits of the plan or the reasons for adopting it, App. 55a n.11 (Kessler, J., dissenting); U.S. Exh. 7-36, and the majority found that at the Board's public hearing "[n]o one spoke in support of the plan." App.

8a. It also is undisputed that although the Board considered a number of different redistricting options, *id.* at 5a, it did not present a scintilla of evidence about its admittedly closed-door efforts to develop another plan. App. 47a (Kessler, J., dissenting); App. 97a (Stip. 96). Instead, the Board claimed that all of the other alternatives were inadvertently destroyed in a series of computer mishaps. J.A. 165-66.

This case, therefore, is unlike either *Miller*, in which "Georgia's Attorney General provided a detailed explanation for the State's initial decision" to adopt an ameliorative plan, 115 S. Ct. at 2492, or *Shaw v. Hunt*, 116 S. Ct. 1894 (1996) ("*Shaw II*"), in which North Carolina initially adopted an ameliorative plan after rejecting a number of other options for legitimate reasons. *Id.* at 1904. In contrast, Bossier presented *no* evidence of any race-neutral reason why its efforts to develop alternative plans were abruptly abandoned in favor of a previously rejected minimizing plan. Here, the record shows only that the Board resurrected the Police Jury plan in direct response to the public demonstration that it was possible to draw majority-black districts. App. 28a, 6a; App. 46a-50a (Kessler, J., dissenting); D-I Br. 14-21.

Bossier now tries to deflect attention from its unexplained reversal by contending that the issue is whether the Board was required to adopt the NAACP plan. B.P. Br. 40. No one has ever so claimed. App. 60a (Kessler, J., dissenting). Instead, as the majority found, the Board was asked to "consider alternative redistricting *plans*." App. 8a (emphasis added). Black voters specifically asked the Board only to use the NAACP plan "as a foundation" to develop a redistricting plan. App. 101a (Stip. 108). Indeed, George Price initially submitted to the Board only the basic demographic information showing that two majority-black districts could be drawn. App. 6a. The Board itself demanded that Price develop a full plan. *Id.* In the

end, therefore, the Board presented no evidence demonstrating a non-discriminatory explanation for its reversal.

B. Board Members Admitted Bossier's Discriminatory Purpose

On the other hand, several Board members actually admitted that the Board's sudden turnabout with respect to the Police Jury plan resulted from the fact that "school board members oppose [the] idea" of "black representation on the board." J.A. 93; App. 31a. The majority below improperly attempted to explain this evidence away, *see* D-I Br. 36-38, and Bossier now asks this Court to accept those explanations. B.P. Br. 50 n.35. The Court should not do so.

The Board member who made the admission quoted above, Henry Burns, did not testify, and as the majority noted, the Board did not "cross-examine . . . on this point." App. 31a. Thus, the statement stands undisputed. Another Board member, Barry Musgrove, also admitted that "other Board members were hostile to drawing majority-black districts." *Id.* at 32a. Mr. Musgrove did testify, and he did not deny "making this statement," as the majority suggests, *id.*, but said only that he did not "recall" it. Tr. I at 56. Finally, Board member Thomas Myrick, whose denial of his involvement in the Police Jury redistricting process the majority rejected as false, *see* D-I J.S. 28 n.9; D-I Br. 11-12 n.3, told the Board's redistricting consultant that he wanted to avoid the creation of a majority-black district, J.A. 163-64, and told black voters that he would not "let [them] take his seat." App. 6a n.4.

Because these statements are direct evidence of the Board's intent, and because Bossier cannot refute them, it attempts instead to avoid them. Although it made no objection below, Bossier now implies that all of these statements are hearsay, B.P. Br. 50 n.35, but, as admissions of a party, they are not. Bossier also now

claims that the statements were only "allegedly" made, *id.*, but it presented no evidence below to raise doubt that they were said. Finally, Bossier claims that these statements are not probative of discriminatory purpose without "the most nefarious possible spin," *id.*, but this clearly is not so. We ask only that the Court accept these statements at face value and view them in the context of the stipulated facts ignored by the majority below.

C. The Board's Otherwise Unexplained Retreat to the Police Jury Plan Dilutes Minority Voting Strength

The majority below erred in refusing to consider the undisputed evidence that the effect of maintaining twelve-of-twelve majority-white districts would be to dilute the ability of minority voters to elect candidates of their choice. D-I Br. 29-33. Bossier now attempts to defend this refusal by falsely contending that the Police Jury plan "enhanced minority voting strength," B.P. Br. 40, and that Bossier Parish is not characterized by racially polarized voting, *id.* at 3-5. However, the record unequivocally shows that: (1) when compared to the Board's 1980s plan the Police Jury plan actually reduces the minority voting-age percentage in the three districts with the highest minority concentrations, *compare* J.A. 47 *with* J.A. 44; and (2) voting in Bossier Parish plainly is racially polarized.

First, no black candidate had ever been elected to the Board. App. 67a (Stip. 4). Second, in the four Board elections since 1980 that involved a contest between a black and white candidate, the black candidate lost every time. *Id.* at 115a (Stip. 153). Third, the *only* expert analysis of election statistics for Bossier Parish concluded that "African American voters are likely to have a realistic opportunity to elect candidates of their choice to the . . . Board only in districts in which they constitute a majority of the voting age population." J.A. 121. The elections in which Bossier now claims that

Dr. Engstrom did not find racial polarization using regression analysis and extreme-case analysis, B.P. Br. 3-4, are simply elections in which the underlying data are insufficient to permit a full application of these statistical techniques. J.A. 111-21. The partial analyses of these elections that Engstrom was able to perform, moreover, support the above-quoted conclusion of racially polarized voting. *Id.*

Moreover, the majority found that the area surrounding Barksdale Air Force Base in which a few black candidates for other offices in recent times have been successful in elections with white opponents is "unique." App. 2a n.1; App. 117a-18a (Stip. 162-63). All but two of the six elections cited by the Board in which a black candidate was successful against a white opponent involved this "unique" community. The other two involved an at-large election system in Haughton, and because these elections allowed for single-shot voting the election of black candidates shows nothing about racial polarization. App. 120a (Stip. 174). Moreover, while Bossier refers to only 14 black-white contests, 17 actually meet its arbitrary limiting criteria; the parties stipulated to facts concerning more than 20 such elections, *id.* at 115a-27a (Stip. 153-96); and the record includes undisputed results from more than 30. J.A. 55-60. In *all* of these other contests, black candidates lost to whites. *Id.*

Accordingly, Bossier is wrong to say that Board elections are not racially polarized, and the majority was wrong in refusing to consider that polarization in assessing the Board's motivation.

D. The School Board's Ongoing History of Discrimination Shows How and Why It Sought to Dilute Minority Voting Strength Through the Police Jury Plan

With respect to the Board's history of discrimination, the "facts" Bossier relies upon again simply cannot be

found in this record. While the Board now claims without support that unidentified "demographic factors" have caused increasing segregation in its schools, B.P. Br. 38-39 n.27, the evidence shows that the Board's own actions have contributed to it. Bossier itself submitted evidence showing that its transfer policy may have contributed to the growing racial imbalance in its schools. Pl. Exh. 14 at 4. The superintendent also admitted that the Board intentionally assigned a widely disproportionate number of minority teachers to predominantly black schools. J.A. 179. This is indisputably contrary to the Board's court-ordered obligations, App. 45a (Kessler, J., dissenting), and is a recognized method of unconstitutionally designating some schools as "black" schools and others as "white." *See Freeman v. Pitts*, 503 U.S. 467, 497 (1992). Finally, not only has the Board failed to achieve a unitary school system, but Board members admittedly were completely ignorant of their court-ordered desegregation obligations. *See, e.g.*, J.A. 74, 148.

In addition, while Bossier now blames its failure to maintain the court-mandated bi-racial committee on the waning "interest of volunteer citizens," B.P. Br. 38 n.27, there is no evidence to support this; instead, the record shows that for more than 20 years the Board reported to the federal court that the actually nonexistent bi-racial committee was "available." U.S. Exh. 84YY; J.A. 134. When the Board finally established a committee in 1993, Board members quickly terminated it for the same reason they adopted the Police Jury plan: they did not want blacks involved in "policy" questions. D-I Br. 9; App. 104a-06a (Stip. 114-17).

As noted, the majority below failed even to address the rest of the voluminous stipulated evidence of discrimination in Bossier Parish, and Bossier now seeks to defend this error by claiming incorrectly that this evidence "says nothing about *why* a black majority district was *not created*." B.P. Br. 35. Plainly it does. We do not

argue, however, as Bossier suggests, that evidence of non-Board discrimination in Bossier Parish is relevant because the Board is responsible for "private citizens' voting patterns" and all "historical discrimination," *id.* at 39. Rather, such evidence is probative because the Board's knowledge of the preferences of private citizens and the patterns of local history—like its awareness of racially polarized voting—made clear to the Board that the way to keep black voters out of "policy" questions was to adopt an election plan with all majority-white districts. App. 42a-46a (Kessler, J., dissenting). *See Rogers v. Lodge*, 458 U.S. 613, 618, 625 (1982).

E. The Board's Plan Fails to Satisfy Its Own Redistricting Criteria

To counter the foregoing showing of discriminatory purpose, Bossier now relies most heavily on the proposition that the Police Jury plan could not be discriminatory because it complies with the Board's traditional redistricting principles. *See* B.P. Br. 6-8, 40-41, 47-50. Not only is this assertion contradicted by the stipulated and unrebutted facts, but it also ignores the governing legal standard.

Bossier argues that this Court has accepted adherence to a "traditional redistricting principle *as a refutation of any discriminatory purpose finding.*" B.P. Br. 47 (emphasis added). To the contrary, the Court carefully scrutinized legislative motives in *Miller*, *Shaw II* and *Bush v. Vera*, 116 S. Ct. 1941 (1996), and, in *Vera*, explicitly refused to accept adherence to a traditional redistricting criterion as a defense even to the allegation that race was *the predominant* factor in a decision, let alone *a contributing* factor, *id.* at 1951-52. While a showing that traditional redistricting principles were not subordinated to race may defeat the "analytically distinct" claim of racial gerrymandering, *Miller*, 115 S. Ct. at 2488, 2485, this Court has never suggested that a political body may intentionally dilute minority voting strength so long as its plan for doing so is

compact, contiguous or respects political subdivisions. Such a perverse rule would subordinate the Constitution to "traditional redistricting principles."

Of course, if the Board had *shown* that the reason it reversed course and adopted the Police Jury plan was to comply with traditional districting principles, this would be a different case. But here the record shows that Bossier's plan does *not* comply with its own criteria. Indeed, while the majority understandably made no finding at all on this subject, Judge Kessler found that the plan "plainly violates a whole number of redistricting principles." App. 51a.

For example, Bossier claims without support that the Police Jury plan "clearly complied with state law," B.P. Br. 40, but the undisputed evidence shows that the Police Jury plan violated state law in at least two respects: by including a district that is not contiguous and by exceeding the maximum allowable deviation from one person, one vote. App. 84a (Stip. 58); D-I Exh. G ¶¶ 31, 32.

The Board also claims without support that the Police Jury plan was compact. B.P. Br. 40. To the contrary, the stipulated facts demonstrate: (1) that the Board's cartographer, Gary Joiner, admitted that one-third of its districts were not compact, App. 111a-12a (Stip. 139); and (2) that one district "contained almost half of the geographic area of the Parish." App. 50a (Kessler, J., dissenting); App. 112a (Stip. 140).

Likewise, Joiner's own testimony defeats Bossier's claim that there is no showing that the Police Jury plan "'fragments' any concentration of minority voters." B.P. Br. 41. In fact, Joiner admitted that the plan appears to "fracture" the predominately black neighborhood surrounding two predominantly black elementary schools. App. 111a-13a (Stip. 137, 138, 142).

Bossier also claims without support that the Police Jury plan maintained the "integrity of municipal" boundaries "like all prior redistricting plans," B.P. Br. at 40, 2, but the record shows: (1) no information about any plan prior to 1980; (2) no indication that the Board ever considered municipal boundaries in redistricting; and (3) several stipulations that the Board was concerned instead about the location of schools in its districts, App. 72a-73a (Stip. 24), and the protection of incumbencies, App. 28a; App. 50a, and that the Police Jury plan violates these criteria. App. 112a (Stip. 141); App. 28a; App. 50a (Kessler, J., dissenting).

Finally, Bossier claims that its plan "respect[s] . . . the Police Jury districts," B.P. Br. 2, but the pertinent evidence in the record is the stipulated fact that "[t]hroughout the 1980s, the Police Jury and School Board maintained different electoral districts." App. 4a n.3.

F. The Board's Alleged Concerns About the Illustrative Plans Are Purely Pretextual and Underscore Its Actual Discriminatory Purpose

Just as the majority below found that "the School Board . . . offered several reasons for its adoption of the Police Jury plan that *clearly were not real reasons*," App. 27a n.15 (emphasis added), Bossier's current assertions questioning plans with majority-black districts are clearly pretextual.

The Board claims that the "black majority districts . . . were plainly not compact," B.P. Br. 40, but the record shows (1) stipulations that the Bossier City district was "an acceptable configuration from the standpoint of district shape," App. 115a (Stip. 150), and that it was "obvious that a reasonably compact black-majority district could be drawn within Bossier City," *id.* at 76a (Stip. 36), where "more than 50 percent of the black population of Bossier Parish is concentrated," *id.* at 68a (Stip. 10); and (2) an illustrative majority-black district

in the northern part of Bossier Parish that is no more irregularly shaped than any number of districts in the Board's 1980s plan and the current Police Jury plan. *See* J.A. 42-43, 45-46, 51-52.

Bossier also now claims that the NAACP plan "split every municipal boundary in the Parish," but the record contains a stipulation that "[o]verall, in the use of logical, traditional features . . . the NAACP Plan is not significantly different from the School Board plan." App. 113a (Stip. 144).

The Board claims as well that William Cooper drew the NAACP plan "for the exclusive purpose of 'creat[ing] two majority-black districts.'" B.P. Br. 2 (quoting J.A. 260). But the intent of the drawers of the various illustrative plans is irrelevant to the *Board's* intent in adopting the Police Jury plan. Moreover, the record shows that (1) the NAACP plan (which Cooper actually did not draw, App. 98a (Stip. 98)) was meant only as an illustration for the Board's information and was not intended to "create" any districts at all, *see* D-I Br. 16-17; and (2) as Cooper explained in the very testimony relied on by Bossier, his own subsequent illustrative plan was drawn to "assess whether or not it was possible to create two majority black districts *using traditional redistricting criteria*." J.A. 260 (emphasis added).

Bossier rests the bulk of its argument on the claim that the NAACP plan "facially violated" state law because it split precincts. B.P. Br. 43, 44. The record, however, shows that (1) no one suggested that the Board split precincts but that it consider working with the Police Jury to establish new ones, App. 156a-57a; J.A. 136-43; (2) the Board was well aware that it could work with the Police Jury to have precincts modified, App. 6a-7a, 29a; App. 99a-100a (Stip. 102); and (3) this procedure is commonplace in Louisiana, App. 72a (Stip. 22-23); J.A. 137-38.

The Board's elevation of precincts to the essential "building blocks" of Louisiana election districts is simply false. B.P. Br. 43. While Bossier claims that the precincts were "used by the Police Jury for its districts," *id.*, the record is clear that the Police Jury first drew its new election districts and *then* had to create a new system of precincts, with at least 13 new ones. App. 85a, 88a, 82a-88a (Stip. 60, 70, 52-68). The parties also stipulated that "Bossier Parish has made a number of . . . precinct realignments in the last ten years," *id.* at 77a (Stip. 38), and Bossier's own evidence confirms that the Police Jury changed precincts in 1987, 1989 and 1991, Pl. Exh. 1, and intended to consolidate precincts again in 1993. App. 85a-86a (Stip. 61).

While Bossier claims, with no record support, that it has a "longstanding, uniform practice of preserving Police Jury precincts," B.P. Br. 47, the state statute requiring the use of whole precincts by school boards did not even apply to any prior redistricting. J.A. 265-66. After the 1980 census, for example, Louisiana law provided that "school board election districts . . . *need not . . . have any relation* to, the . . . precincts that may be created by the police jury." *Id.* at 263 (emphasis added). Bossier also claims that it was "required to use [the] existing 1991 precincts," B.P. Br. 2, but, even under the new statute, the whole-precinct requirement did not apply where "the number of members of the school board is not equal to the number of" police jurors, J.A. 266, and a plan with five, seven or nine members, rather than 12, was one of the options that the Board originally considered but then abandoned without explanation. Tr. I at 44.

Most importantly, while Bossier now implies it was "powerless" to develop a plan that did not employ all of the Police Jury's precincts, B.P. Br. 43, the majority below found that the Board was "free to request precinct changes from the Police Jury," App. 7a, and it is undis-

puted that the Board knew it could "work with the Police Jury to alter the precinct lines." App. 95a (Stip. 89). It also is undisputed that through such cooperation the Police Jury could *reduce* its total precincts from 56 to 46 without changing its own election districts at all and still accommodate a School Board plan with two majority-black districts. D-I Exh. G ¶ 36. Nevertheless, the Board never even approached the Police Jury about modifying precincts. App. 7a. As a result, its alleged concern over precinct-splitting must be treated as pretextual, particularly in the face of the overwhelming evidence showing that the abrupt, belated adoption of the Police Jury plan was at least in part racially motivated.

CONCLUSION

When *all* the stipulated and unrebutted evidence is fairly considered under the governing standards, it is "far from being equally convincing on either side. Not only does the evidence fail to prove absence of discriminatory purpose, it shows that racial purpose fueled the School Board's decision." App. 38a-39a (Kessler, J., dissenting). This Court, therefore, should reverse.

Respectfully submitted,

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Supreme Court, U.S.
FILED
AUG 1 1996
CLERK

Nos. 95-1455 & 95-1508

In The

Supreme Court of the United States

October Term, 1995

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES,

Appellant,

and

GEORGE PRICE, ET AL.,

Appellants,

v.

BOSSIER PARISH SCHOOL BOARD,

Appellee.

On Appeal From The United States District Court For The District Of Columbia

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Gayle Binion, "The Interpretation of Section 5 of the 1965 Voting Rights Act: A Retrospective on the Role of Courts," 32 *W.Pol.Q.* 154 (1979) 7

Richard L. Engstrom, "Racial Vote Dilution: Supreme Court Interpretation of Section 5 of the Voting Rights Act," 4 *So.U.L.Rev.* 139 (1978) 7

Mark E. Haddad, "Getting Results Under Section 5 of the Voting Rights Act," 94 *Yale L.J.* 139 (1984) 7

Heather K. Way, "A Shield or a Sword? Section 5 of the Voting Rights Act and the Argument for the Incorporation of Section 2," 74 *Tex.L.Rev.* 1439 (1996) 11

INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to defending the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. As part of that commitment, the ACLU has been active in defending the equal right of racial and other minorities to participate in the electoral process. Specifically, the ACLU has participated in voting cases before this Court, both as direct counsel, *see, e.g., Holder v. Hall*, 114 S.Ct. 2581 (1994), *Miller v. Johnson*, 115 S.Ct. 2475 (1995), and as *amicus curiae*, *see, e.g., United States v. Hays*, 115 S.Ct. 2431 (1995).

The NAACP Legal Defense and Educational Fund, Inc. is a nonprofit corporation chartered by the Appellate Division of the New York Supreme Court as a legal aid society. The Fund was established for the purpose of assisting African Americans in securing their constitutional and civil rights. *See NAACP v. Button*, 371 U.S. 415, 422 (1963) (noting Fund's "reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation"). The Fund has participated in many of the significant constitutional and statutory voting rights cases in this Court. *See e.g., United Jewish Org. v. Carey*, 430 U.S. 144 (1977); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Shaw v. Hunt*, 1996 WL 315870 (U.S. June 13, 1996); and *Bush v. Vera*, 1996 WL 315857 (U.S. June 13, 1996).

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

SUMMARY OF ARGUMENT

The appeal of this declaratory judgment action under Section 5 of the Voting Rights Act presents two separate issues: (1) whether the district court erred in holding that the Bossier Parish School Board carried its burden of proving a lack of discriminatory purpose in enacting its redistricting plan, and (2) whether a violation of Section 2 of the Voting Rights Act provides an independent basis for denying preclearance under Section 5. *Amici* agree that, in this case, it is unnecessary for the Court to reach the second issue, because the district court majority clearly erred in applying the purpose prong of Section 5, and its decision must be reversed on that basis. In the event, however, that the Court reaches the second issue, this *amici* brief is submitted to describe the context and legislative history of amended Section 2 which clearly demonstrate Congress' intent to assure that a voting change violating Section 2 of the Act would not be required to receive preclearance under Section 5 of the Act. To avoid repetition of the arguments in the principal briefs, the *amici* brief is limited to this latter issue, as to which *amici* have a special interest based on their involvement as counsel in past Section 5 cases that have addressed this issue. *See Georgia v. Reno*, 881 F.Supp. 7 (D.D.C. 1995) (three-judge court); *Texas v. United States*, 1995 WL 769160 (D.D.C. 1995) (three-judge court).

The legislative history of the 1982 amendments and extension of the Voting Rights Act show that Congress intended for the results standard of Section 2 to apply to Section 5 preclearance. Congress was well aware of the limitations of the retrogression standard of *Beer v. United States*, 425 U.S. 130 (1976), when it extended and

amended the Act in 1982. The Senate Report that accompanied the amendments provides that "[i]n light of the amendment to section 2, it is intended that a section 5 objection also follow if a new voting procedure so discriminates as to violate section 2." S. Rep. No. 417, 97th Cong., 2d Sess. 12 n.31 (1982).

The principal cosponsors of the 1982 amendments, Senator Kennedy and Representative Sensenbrenner, reiterated on the floors of the Senate and House during the legislative debates that "where there is a section 5 submission which is not retrogressive, it would be objected to only if the new practice itself violated the Constitution or amended section 2." 128 Cong. Rec. S7095 (daily ed. June 16, 1982) (remarks of Sen. Kennedy); 128 Cong. Rec. H3841 (daily ed. June 23, 1982) (remarks of Rep. Sensenbrenner). Representative Edwards, a sponsor of the final bill and chair of the House subcommittee with jurisdiction over the extension of the Act, concurred with Representative Sensenbrenner's interpretation of the bill. 128 Cong. Rec. H3840-41.

Congress also acted with knowledge of the Attorney General's then established practice of denying preclearance to changes which violated other provisions of the Act. When Congress reenacts a statute and voices its approval of an administrative or other interpretation of the statute, as it did in the Senate Report, Congress is treated as having adopted that interpretation, and the courts are bound by it.

The Senate Report is entitled to greater weight than any other of the legislative history. This Court has described the Senate Report as being "the authoritative

source" for construction of the 1982 amendments to the Act. *Thornburg v. Gingles*, 478 U.S. 30, 43 n.7 (1986). It has been the established practice of the Court, moreover, to examine the applicable committee reports to determine congressional intent and the meaning of specific provisions of the Voting Rights Act, particularly Section 5, where the statute itself was silent or ambiguous.

While Congress did not amend Section 5, it did amend the Voting Rights Acts and provided that amended Section 2 was to apply to preclearance. It is common for Congress to add a provision to an act and apply it to a second provision of the same act without changing the language of the second provision.

Some voting changes are not amenable to analysis under a retrogression standard. A change from appointed to elected county commissioners, for example, would be covered by Section 5, but it might be difficult to determine the effect of such a change based upon a retrogression analysis. In other cases, there may be no practice or procedure *at all* that can be used as a benchmark for determining retrogression, *e.g.*, where a newly incorporated college district or municipality selects for the first time a method of conducting elections. Under the circumstances, a voting plan which fairly reflects the strength of the minority community as it exists would furnish the logical and appropriate basis for comparison.

The application of Section 2 to preclearance would not cause a major or disruptive change in the administration of Section 5. The Attorney General has administered the statute in such a manner in the past. The purpose or effect standards would continue to apply and dispose of

the vast majority of submitted voting changes. It would make very little sense from the standpoint of public policy and conserving judicial resources to allow violations of one section of the Voting Rights Act (Section 2) to be approved by another (Section 5). Such a result would undercut the enforcement mechanisms and the overall purpose of the Act. The evidence shows that Congress intended to correct the anomalies of *Beer* by applying Section 2 to Section 5 preclearance.

ARGUMENT

I. Section 2 Applies to Section 5 Preclearance

The legislative history of the 1982 amendments and extension of the Voting Rights Act of 1965, 42 U.S.C. § 1973 *et seq.*, make it clear that Congress intended for the results standard of Section 2 to apply fully to Section 5 preclearance. Accordingly, a covered jurisdiction such as Bossier Parish would be entitled to preclearance of its voting changes only if it showed that they did not "result" in discrimination as that term has been defined by Congress and the Supreme Court. *Thornburg v. Gingles*, 478 U.S. 30, 35-8, 48-51 (1986).[2]

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[2] The issue of the applicability of Section 2 to Section 5 was presented in *City of Lockhart v. United States*, 460 U.S. 124, 133 n.9 (1983), but because the district court had not passed on it this Court declined to grant review in the first instance.

A. Interpretation of Section 5 Effects Test Prior to 1982

A majority of the Court, in a divided opinion, held in *Beer v. United States*, 425 U.S. 130 (1976), that only changes which were retrogressive or affirmatively diminished minority voting rights were prohibited by the "effect" language of Section 5.

Beer, however, was by its own terms ambiguous, for while the Court adopted a retrogression test, the Court nonetheless acknowledged that an ameliorative submission would be objectionable under Section 5 if it "so discriminates on the basis of race or color as to violate the Constitution." 425 U.S. at 141. Cases cited by the majority in *Beer* as illustrative of the applicable constitutional standard included *White v. Regester*, 412 U.S. 755 (1972), which applied an effect standard in minority vote dilution cases. *See Thornburg v. Gingles*, 478 U.S. at 35 (describing *White v. Regester* as embodying a "results test").[3] Thus, *Beer* itself may properly be said to contain an anti-dilution exception to the very retrogression standard which it purported to establish.[4]

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[3] *Washington v. Davis*, 426 U.S. 299 (1976), and *City of Mobile v. Bolden*, 446 U.S. 55 (1980), which held respectively that proof of a discriminatory purpose was required for a violation of the Fourteenth or Fifteenth Amendments, were decided after *Beer*.

[4] The retrogression standard of *Beer* was strongly criticized by legal commentators. Principal objections were that it sanctioned and perpetuated vote dilution, rewarded jurisdictions with the worst histories of discrimination against minority voters, and largely ignored the legislative history and underlying purposes of the Voting Rights Act. Gayle Binion, "The Interpretation of Section 5 of the 1965 Voting Rights Act: A

In recognition of its limitations and anomalies, the courts created a number of exceptions to the strict application of the retrogression principle. For example, the District of Columbia court has held that a new legislative plan cannot be approved, even if it is not retrogressive compared with the preexisting legislative plan, if it diminishes minority voting strength when compared with an intervening court ordered plan. *Mississippi v. United States*, 490 F.Supp. 569, 582 (D.D.C. 1979), *aff'd mem.*, 444 U.S. 1050 (1980); *Mississippi v. Smith*, 541 F.Supp. 1329, 1333 (D.D.C. 1982) (three-judge court), *appeal dism'd*, 461 U.S. 912 (1983). Preexisting districts that have not themselves been precleared may also not be used in determining if a submission is retrogressive. *Mississippi v. Smith*, 541 F.Supp. at 1332. *Accord*, 28 C.F.R. § 51.54(b)(3).

In *Wilkes County, Georgia v. United States*, 450 F.Supp. 1171 (D.D.C. 1978) (three-judge court), *aff'd mem.*, 439 U.S. 999 (1981), the court created another important exception to *Beer* where an existing plan was malapportioned. Wilkes County, which was 47% black, sought preclearance of a change from district to at-large elections. It argued that the proposed change did not have a discriminatory effect within the meaning of *Beer* because even if blacks were not able to elect candidates of their choice

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Retrospective on the Role of Courts," 32 *W.Pol.Q.* 154, 171 (1979); Richard L. Engstrom, "Racial Vote Dilution: Supreme Court Interpretation of Section 5 of the Voting Rights Act," 4 *So.U.L.Rev.* 139, 162 (1978); Mark E. Haddad, "Getting Results Under Section 5 of the Voting Rights Act," 94 *Yale L.J.* 139 (1984).

at-large, neither did they control any of the preexisting single member districts. The court rejected the county's argument:

> Since the existing districts are severely malapportioned, it is appropriate, in measuring the effect of the voting changes, to compare the voting changes with options for properly apportioned single-member district plans.

450 F.Supp. at 1178. Based upon the census, if Wilkes County had been divided into fairly drawn single-member districts of equal population, the black population in one district could have been as high as 71%. Using the proper basis for comparison, the court concluded that blacks were worse off under the change, and that "the at-large method has . . . a racially discriminatory effect." *Id.*

B. Congressional Action in 1982

Congress was well aware of *Beer* and its limitations when it extended and amended the Voting Rights Act in 1982. In amending Section 2 it incorporated the results standard for determining the lawfulness of voting practices, and provided that the amended statute was to apply to Section 5 preclearance. According to the Senate Report that accompanied the amendments:

> Under the rule of *Beer v. United States* . . . a voting change which is ameliorative is not objectionable unless the change 'itself so discriminates on the basis of race or color as to violate the Constitution.' . . . In light of the amendment to section 2, it is intended that a section 5 objection also follow if a new voting procedure so discriminates as to violate section 2.

S. Rep. No. 417, 97th Cong., 2d Sess. 12 n.31 (1982) (citations omitted).[5]

The principal cosponsors of the 1982 amendments, Senator Kennedy and Representative Sensenbrenner, reiterated on the floors of the Senate and House during the legislative debates that "where there is a section 5 submission which is not retrogressive, it would be objected to only if the new practice itself violated the Constitution or amended section 2." 128 Cong. Rec. S7095 (daily ed. June 16, 1982) (remarks of Sen. Kennedy); 128 Cong. Rec. H3841 (daily ed. June 23, 1982) (remarks of Rep. Sensenbrenner). Representative Edwards, a sponsor of the final bill and chair of the House subcommittee with jurisdiction over the extension of the Act, concurred with Representative Sensenbrenner's interpretation of the bill. 128 Cong. Rec. H3840-41.

Congress also acted with knowledge of the Attorney General's then established practice of denying preclearance to changes which violated other provisions of the Act. The Attorney General, for example, had consistently denied Section 5 preclearance to changes which violated Section 4(f)(4) of the Act, a provision requiring

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[5] Given the ambiguity in the effect standard, resort to the legislative history to determine its meaning is both necessary and proper. *See Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992). The Court has regularly applied this principle in construing the Voting Rights Act. *See, e.g., Johnson v. DeGrandy*, 129 L.Ed.2d 775, 795 (1994); *Perkins v. Matthews*, 400 U.S. 379, 389 n.8 (1971).

certain jurisdictions to implement bilingual voting procedures. Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 1659 (1982) [hereinafter Voting Rights Act Hearings (1982)]. This interpretation of Section 5 was reported to Congress by William Bradford Reynolds, Assistant Attorney General for Civil Rights, when it considered the extension and amendment of the Act in 1982. Voting Rights Act Hearings (1982) at 1659, 1720.

In its discussion of *Beer*, the Senate Report also noted and approved the Attorney General's practice of not applying a strict retrogression test, but treating submissions "on a case-by-case basis, 'in light of all the facts.' " S. Rep. No. 417 at 12 n.31. When Congress reenacts a statute and voices its approval of an administrative or other interpretation of the statute, as it did in the Senate Report, "Congress is treated as having adopted that interpretation, and the Court is bound thereby." *United States v. Board of Commissioners of Sheffield, Ala.*, 435 U.S. 110, 134 (1978). *Accord, Lorillard v. Pons*, 434 U.S. 573, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change").

Congress further confirmed its intention that Section 2 standards were to apply to preclearance when it conducted oversight hearings in 1985 on the Attorney General's proposed revisions of the regulations governing Section 5. According to the House Report, "the Subcommittee concludes that it is a proper interpretation of the legislative history of the 1982 amendments to use Section

2 standards in the course of making Section 5 determinations." Subcommittee on Civil and Constitutional Rights of the Comm. on the Judiciary U.S. House of Representatives, 99th Cong., 2d Sess., Voting Rights Act: Proposed Section 5 Regulations 5 (Comm. Print 1986 Ser. No. 9) [hereinafter Comm. Print (1986)].[6]

The lower court's observation that Section 2 and Section 5 are "different," App. 15a, is a non sequitor. The sections *are* different. The issue, however, is whether Section 2 standards are to be applied in Section 5 preclearance. The legislative history indicates that they should be.

C. The Attorney General's Regulations

In light of the 1982 amendments, the Attorney General adopted regulations in 1987 calling for the application of Section 2 standards to Section 5 preclearance. The regulations, which were widely circulated prior to their

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[6] Following those hearings, prominent members of Congress endorsed this construction of the Act in correspondence addressed to the Attorney General following rumors that the Department of Justice would abandon the application of Section 2 standards in the Section 5 review process. Senator Dole, for example, stated that he had " 'a vital interest in assuring that the Voting Rights Act is interpreted . . . consistent with Congress' intent. Preclearing voting changes that violate Section 2 would threaten the integrity of Section 5 as a barrier to all illegal voting discrimination and be in direct conflict with the law's legislative history.' " *See* Heather K. Way, "A Shield or a Sword? Section 5 of the Voting Rights Act and the Argument for the Incorporation of Section 2", 74 *Tex.L.Rev.* 1439, 1468 (1996) (quoting this and other letters).

promulgation[7] and were the subject of Congressional hearings, *see* Oversight Hearings on Proposed Changes to Regulations Governing Section 5 of the Voting Rights Act, before the Subcomm. on Civil and Constitutional Rights of the House Committee on the Judiciary House of Representatives, 99th Cong., 1st Sess. (1985) [hereinafter Oversight Hearings], provide that:

> In those instances in which the Attorney General concludes that, as proposed, the submitted change is free of discriminatory purpose and retrogressive effect, but also concludes that a bar to implementation of the change is necessary to prevent a clear violation of amended Section 2, the Attorney General shall withhold Section 5 preclearance.

28 C.F.R. § 51.55(b)(2).

Since the 1982 amendments and the promulgation of the regulations, the Attorney General has continued to object to submissions if they violated Section 2. *See* Comm. Print (1986) at 4; Oversight Hearings (1985) at 210-12, 229-34 (describing Section 5 objections in 1983 to redistricting plans from Amite and Oktibbeha Counties, Mississippi on the grounds that they violated amended Section 2). While the regulations and decisions of the Attorney General are not binding upon the courts, the contemporaneous administrative construction of the Act by the Attorney General is persuasive evidence of the intent of Congress in enacting the 1982 amendments.

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[7] The regulations were published in proposed form for comment. 50 Fed. Reg. 19122 (May 6, 1985).

United States v. Board of Commissioners of Sheffield, Alabama, 435 U.S. at 131.[8]

D. The Legislative History Cannot Be Discounted

Despite the evidence noted above, the court below held that Section 2 does not apply to Section 5 because the legislative history is not extensive. App. 17a. The Senate Report, as the report commended to the full Senate and representing the collective understanding of the members involved in drafting and studying the proposed legislation, is entitled to greater weight than any other of the legislative history. *See Garcia v. United States*, 469 U.S. 70, 76 n.3 (1984) ("the authoritative source for finding the legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation,' " *quoting Zuber v. Allen*, 396 U.S. 168, 186 (1969); *American Jewish Congress v. Kreps*, 574 F.2d 624, 629 n.36 (D.C.Cir. 1978) ("[s]ince the conclusions in the conference report were commended to the entire Congress, they carry greater weight than other of the legislative history"). In addition, the Supreme Court has described the Senate Report as being "the authoritative source" for construction of the 1982 amendments to the Act. *Thornburg v. Gingles*, 478 U.S. at 43 n.7.

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[8] In *Miller v. Johnson*, 115 S.Ct. 2475, 2493 (1995), the Court confirmed the retrogression standard of the effect prong of Section 5, but the issue of the incorporation of Section 2 standards into preclearance was not presented, and thus not decided, in *Miller*.

In *Thornburg v. Gingles*, the *amicus* supporting the appellants argued that the report represented "a compromise among conflicting 'factions,' and thus is somehow less authoritative than most Committee Reports." 478 U.S. at 43 n.7. The Supreme Court rejected the claim.

> We are not persuaded that the legislative history of amended § 2 contains anything to lead us to conclude that this Senate Report should be accorded little weight. We have repeatedly recognized that the authoritative source for legislative intent lies in the Committee Reports on the bill.

Id. The Court went on to rely extensively on the Senate Report and cited it numerous times in construing amended Section 2. 478 U.S. at 43-8.

It has been the established practice of the Court, moreover, to examine the applicable committee reports to determine congressional intent and the meaning of specific provisions of the Voting Rights Act, particularly Section 5, where the statute itself was silent or ambiguous. In *Beer*, in determining how to measure discriminatory effect, as to which Section 5 itself was silent, the Court relied mainly upon the House Report of the 1975 extension of the Act. 425 U.S. at 141 (citing H.R. Rep. No. 196, 94th Cong., 1st Sess. 60 (1975)). In *City of Rome v. United States*, 446 U.S. 156, 168-69 (1980), the Court resolved the question whether individual jurisdictions could bailout from Section 5 coverage by examining the House and Senate Reports. 446 U.S. at 168-69 (citing H.R. Rep. No. 439, 89th Cong., 1st Sess. (1965), and S. Rep. No. 162, 89th Cong., 1st Sess. (1965)). In *United States v. Board of Commissioners of Sheffield County, Alabama*, in concluding that

subjurisdictions were subject to preclearance by virtue of statewide Section 5 coverage, the Court found particularly "significant" the discussion of the issue in the House and Senate reports. 435 U.S. at 134 (citing S. Rep. No. 295, 94th Cong., 2d Sess. 12 (1975), and H.R. Rep. No. 196 at 5). In *McDaniel v. Sanchez*, 452 U.S. 130 (1981), the Court discussed the 1975 committee reports at length in holding that any voting change, including those ordered into effect by a local federal court, which reflects the policy choices of elected officials is subject to Section 5. 452 U.S. at 146-51 (citing S. Rep. No. 295 and H.R. Rep. No. 196). In *Chisom v. Roemer*, 501 U.S. 380, 393-394 ns.20, 21, 395 n.22 (1991) (citing S. Rep. No. 417), and *Houston Lawyers' Association v. Attorney General of Texas*, 501 U.S. 419 (1991), the Court found that state appellate and trial court judges were "representatives" within the meaning of Section 2 based, *inter alia*, upon the 1982 Senate Report. Clearly, there is no basis for contending that the Section 2 incorporation argument fails because it relies primarily upon the Senate Report, App. 17a; the report is the authoritative source of construction of the Act.

The claim that the legislative history is not extensive also discounts the fact that the principal cosponsors of the 1982 amendments stated during the floor debates that Section 2 was to apply to preclearance. Because these members of Congress were sponsors and principal architects of the 1982 amendments, their views "deserv[e] to be accorded substantial weight." *NLRB v. Fruit Packers*, 377 U.S. 58, 66 (1964); *North Haven Board of Education v. Bell*, 456 U.S. 512, 527 (1982) (the statements of a sponsor of a bill "are an authoritative guide to the statute's construction"); *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 564

(1976). Every time the issue was directly addressed – in the debates and in the Senate Report – the conclusion was that Section 2 was applicable to Section 5.[9]

E. Congress Did Amend the Voting Rights Act

The lower court also held that Congress did not intend to import Section 2 standards into Section 5 because it did not amend the latter statute. App. 20a. Congress did, however, amend the Voting Rights Act and provided that amended Section 2 was to apply to pre-clearance.

It is common for Congress to add a provision to an act and apply it to a second provision of the same act without changing the language of the second provision. For example, Congress enacted the Civil Rights Restoration Act of 1987 in response to *Grove City College v. Bell*, 465 U.S. 555 (1984),[10] to amend four pre-existing civil rights acts, *i.e.*, Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; the Age Discrimination Act of 1975, 42 U.S.C. § 6102; and, Title VI of the Civil Rights

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[9] That the floor debate was limited is not surprising in view of the fact that Section 5 preclearance (as opposed to its duration) was not a very controversial issue. It was the amendment of Section 2 that absorbed the attention of Congress. Comm. Print (1986) at 4.

[10] *Grove City* held that discrimination in a "program or activity" of a college didn't subject the institution as a whole to the nondiscrimination provisions of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a).

Act of 1964, 42 U.S.C. § 2000d, and provide that discrimination was prohibited throughout entire institutions or agencies if any part received federal financial assistance. The Civil Rights Restoration Act did not, however, make any changes or add any language to the coverage or fund termination provisions of the pre-existing acts. S. Rep. No. 64, 100th Cong., 2d Sess. (1987). Moreover, in three of the four instances, amendment was accomplished by adding an entirely separate provision defining the term "program or activity" in a broad, institution-wide manner. Title IX was amended by 20 U.S.C. § 1687; the Age Discrimination Act was amended by 42 U.S.C. § 6107; and, Title VI was amended by 28 U.S.C. § 2000d-4. In only one instance was the statute creating the prohibition of discrimination itself amended, the Rehabilitation Act of 1973, 29 U.S.C. § 794(b).

Congress did the same thing when it enacted the 1982 amendments to the Voting Rights Act as it did when it passed the Civil Rights Restoration Act of 1987 amending the pre-existing civil rights statutes. It did not add new language to Section 5, but instead amended Section 2 and provided in the legislative history that Section 2 was to apply to preclearance. Given its broad authority to enforce the Fourteenth and Fifteenth Amendments by appropriate legislation, *South Carolina v. Katzenbach*, 383 U.S. 301, 326-27, 337 (1966), Congress did not exceed its powers in acting as it did.

F. Some Voting Changes Are Not Amenable to Analysis Under the Retrogression Standard

The argument that the anti-dilution standard of Section 2 does not apply to Section 5 does not take proper account of the fact that the effect of some voting changes is simply not amenable to analysis under a retrogression standard. A change from appointed to elected county commissioners, for example, would be covered by Section 5, *McCain v. Lybrand*, 465 U.S. 236, 250 n.17 (1984), *Horry County v. United States*, 449 F.Supp. 990, 995 (D.D.C. 1978), but it might be extremely difficult to determine the effect of such a change based upon a retrogression analysis. If the change were to at-large elections or single-member districts which fragmented the minority community and diluted its voting strength, would it nonetheless be entitled to preclearance if under the old system no minorities had been appointed to the commission, and there was no evidence that the change was racially motivated? The difficulty with retrogression analysis under these circumstances is that there is no pre-existing electoral system which can be used as a basis for comparing the effect of the new practice.

In other cases, there may be no practice or procedure *at all* that can be used as a benchmark for determining retrogression, *e.g.*, where a newly incorporated college district or municipality selects for the first time a method of conducting elections. *See* 28 C.F.R. § 51.54(b)(4). Under the circumstances, a voting plan which "fairly reflects" the strength of the minority community as it exists would furnish the logical and appropriate basis for comparison. *City of Richmond v. United States*, 422 U.S. 358, 378 (1975).

The application of Section 2 to preclearance would not cause a major or disruptive change in the administration of Section 5. Indeed, the Attorney General has administered the statute in such a manner in the past. The purpose or effect standards would continue to apply and dispose of the vast majority of submitted voting changes. According to the Attorney General, during his review of the thousands of voting changes submitted since the 1982 amendments, "only a handful . . . even arguably presented th[e] possibility" of being disposed of on Section 2 grounds. 52 Fed. Reg. 486-90 (1987) (comments to 28 C.F.R. § 51). In those relatively rare – but important – cases where a retrogression analysis was not applicable, or where a voting change which did not have a discriminatory purpose or effect nevertheless "resulted" in discrimination, an anti-dilution standard should apply.

It would make very little sense from the standpoint of public policy and conserving judicial resources to allow violations of one section of the Voting Rights Act (Section 2) to be approved by another (Section 5). Such a paradigm would undercut the enforcement mechanisms and the overall purpose of the Act.[11] The evidence shows that Congress intended to correct the anomalies of *Beer* by applying Section 2 to Section 5 preclearance.

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[11] *See Sheffield*, 435 U.S. at 136 ("The only recourse available would be the one Congress found to be unsatisfactory: repeated litigation").

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
AUG 15 1996
CLERK

(7) (8)

Nos. 95-1508 & 95-1455

In the Supreme Court of the United States
October Term, 1995

GEORGE PRICE, *et al.*,
Appellants,
v.
BOSSIER PARISH SCHOOL BOARD,
Appellee.

and

JANET RENO, Attorney General
of the United States,
Appellant,
v.
BOSSIER PARISH SCHOOL BOARD,
Appellee.

On Appeal from the United States District Court for the District of Columbia

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEE

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In the Supreme Court of the United States
October Term, 1995

GEORGE PRICE, *et al.*,
Appellants,

v.

BOSSIER PARISH SCHOOL BOARD,
Appellee,

and

JANET RENO, Attorney General
of the United States,
Appellant,

v.

BOSSIER PARISH SCHOOL BOARD,
Appellee.

On Appeal from the United States District Court for the District of Columbia

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEE

IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus

curiae in support of appellee, Bossier Parish School Board. All parties have consented to the filing of this amicus brief. The letters of consent have been lodged with the Clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

Pacific Legal Foundation is submitting this brief because it believes its public policy perspective and litigation experience in the voting rights arena will provide an additional viewpoint with respect to the issues presented. PLF attorneys have participated in numerous other Voting Rights Act cases before this Court including *Lopez v. Monterey County, California*, Docket No. 95-1201; *Abrams v. Johnson*, Docket Nos. 95-1425, 95-1460; *Bush v. Vera*, __ U.S. __, 116 S. Ct. 1941 (1996); *Shaw v. Hunt*, __ U.S. __, 116 S. Ct. 1894 (1996); *Louisiana v. Hays*, __ U.S. __, 115 S. Ct. 2431 (1995); *Chisom v. Roemer*, 501 U.S. 380 (1991); and *League of United Latin American Citizens v. Attorney General of Texas*, 501 U.S. 419 (1991).

PLF believes that racial classifications by government, both in the voting rights context and otherwise, are inherently suspect and, absent extraordinary circumstances, unconstitutional. In this case, the appellants seek to use the Voting Rights Act as a vehicle to promote racial quotas in elective office. PLF believes that this attempted means, which

implicates critical federalism concerns, must be emphatically rejected by this Court.

OPINION BELOW

The opinion of the United States District Court for the District of Columbia, holding that an inquiry based on Section 2 of the Voting Rights Act cannot be imported into a Section 5 preclearance proceeding, is reported at 907 F. Supp. 434 (D.D.C. 1995).

STATEMENT OF THE CASE

The Bossier Parish School Board (School Board or Board), located in northwestern Louisiana, sought preclearance of a redistricting plan under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. *Bossier Parish School Board v. Reno*, 907 F. Supp. at 437. The School Board needed to redistrict because the 1990 census showed markedly divergent populations among the Board's 12 districts. Members of the School Board were elected by majority vote. In the School Board's history, no black candidate had been elected to membership. However, the Board did appoint a black member to a vacant seat in 1992. *Id.* at 437-38.

The School Board initially approached the governing body of the parish, known as the "Police Jury" to see if they could jointly redistrict. The Police Jury also has 12 members. The Police Jury declined to work with the School Board, however, because of different incumbency concerns. *Id.* at 438. The Police Jury drew up a plan which was subsequently precleared by the Department of Justice (DOJ) and went into effect. The School Board then hired the same

cartographer and went to work on its own plan. *Id.* at 438. Meanwhile, the local National Association for the Advancement of Colored People (NAACP) wanted to become involved in the process and specifically said that it would dispute any plan that did not provide for majority-black districts. *Id.* The NAACP drew up its own plan containing two majority-black districts and presented it to the School Board. However, the Parish District Attorney dismissed the NAACP plan because it required splitting 46 voting precincts in violation of Louisiana law. *Id.* at 438.

In the midst of this controversy, the School Board decided to sidestep further escalation by adopting the Police Jury plan as its own. *Id.* at 439. The School Board submitted the plan to the DOJ for preclearance. Despite the fact that the DOJ precleared the identical plan for the Police Jury, the DOJ refused to preclear the School Board plan on the basis of "new information," namely, the existence of the NAACP plan, which the DOJ preferred. *Id.*

For a political subdivision subject to Section 5 to obtain preclearance of a voting change, it must prove that the proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c. The "effect" prong of Section 5 requires a showing of retrogression. *Beer v. United States*, 425 U.S. 130, 141 (1976). All parties in this case agree that there is no retrogressive effect from the School Board's proposed redistricting plan. *Bossier Parish*, 907 F. Supp. at 440. Thus, the School Board must demonstrate that the redistricting plan was enacted without a discriminatory purpose.

The School Board argued it had several legitimate purposes: to avoid controversy, to keep precincts intact, to adhere to traditional districting principles, and to avoid racial gerrymandering. *Id.* The DOJ, on the other hand, argued that preclearance should be denied because either (1) the

redistricting plan itself violates Section 2 of the Voting Rights Act; or (2) a Section 2 violation is evidence of discriminatory purpose. *Id.*[1]

The District Court in this case rejected the DOJ's attempt to merge these two very different sections--Section 2 and Section 5--of the Voting Rights Act. *Id.* at 440-41. The DOJ appealed to this Court and the Court noted probable jurisdiction on June 3, 1996.

SUMMARY OF ARGUMENT

Appellants in this case seek to merge Sections 2 and 5 of the Voting Rights Act. First, appellants seek direct importation of Section 2, a broad-ranging statute designed to combat discriminatory actions relating to participation in the political process, into Section 5, the preclearance provision for certain covered jurisdictions. Such importation is directly contrary to the language and intent of the Voting Rights Act, including the 1982 amendments. For this reason, every court which has considered this argument has rejected it. Next, appellants argue that even if Section 2 cannot be directly imported into Section 5, then evidence of a Section 2 violation may still appropriately be used to deny preclearance. In this way, appellants seek the same result indirectly as they do directly; and for the same reasons, this argument should be rejected. Moreover, the merger of Section 2 and Section 5 (whether direct or indirect) would

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[1]Section 2 of the Voting Rights Act provides, in part, that "no voting qualification or prerequisite to voting, or standards, practice, or procedure shall be imposed or applied by any state or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973.

exact severe costs on the federalism doctrine which forms the basis for American governance.

ARGUMENT

I

THE FEDERALISM COSTS ALREADY EXACTED BY SECTION 5 SHOULD NOT BE EXACERBATED BY EXPANDING A SECTION 5 PRECLEARANCE PROCEEDING TO INCLUDE SECTION 2 LITIGATION

A statute will not be construed to undercut state authority unless the congressional enactment clearly and expressly states that purpose. A state's sovereignty, consistent with the Tenth Amendment,[2] must be recognized in determining the extent to which federal courts and the DOJ will be permitted to restructure election changes made without discrimination. Federalism concerns consistent with the Tenth Amendment have been formalized by the rule that a statute will not be construed to undercut state authority unless there is a showing of the "unambiguous intent" of Congress to effect the purpose. *New York v. United States*, 505 U.S. 144, 171 (1992). "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of a clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Id.* Even as

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[2]The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people. U.S. Const. Amend. X.

construed in *Beer*, 425 U.S. at 141, Section 5 is indisputably a serious intrusion into the normal federal-state balance of authority. *See, e.g., United States v. Board of Commissioners*, 435 U.S. 110, 141 (1978) (Stevens, J., dissenting). To go beyond the retrogression limits of the freezing remedy permitted by *Beer* would be a huge extension of Section 5, an extension for which there is a glaring absence of the necessary clear statement from Congress.

This Court first considered the constitutionality of Section 5 in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). In that case, South Carolina challenged Congress' authority to require federal approval of proposed state laws, claiming that Section 5 violated the Tenth Amendment by encroaching on powers reserved to the states. *Id.* at 323. The Court responded that the states' power to violate the Fifteenth Amendment is nowhere protected in the Constitution: "The gist of the matter is that the Fifteenth Amendment supersedes contrary exertions of state power." *Id.* at 325; *see also City of Rome v. United States*, 446 U.S. 156, 202 (1980) (Powell, J., dissenting) ("[p]reclearance [is] a prophylactic measure based on the remedial power of Congress to enforce the Fifteenth Amendment"). In dissent, Justice Black's primary constitutional objection was that through the Act's preclearance requirement the United States was usurping power from the states in flagrant violation of the Tenth Amendment. *See Katzenbach*, 383 U.S. at 358-61 (Black, J., concurring in part and dissenting in part). By requiring federal approval before a state can enforce its laws, he maintained, Section 5 "so distorts our constitutional structure of government as to render any distinction drawn in the Constitution between state and federal power almost meaningless." *Id.* at 358 (Black, J., concurring in part and dissenting in part). Congress' power to enforce the Fifteenth Amendment, he believed, does not encompass such a shift of power from the states to the federal government. *Id.*

at 357-58 (Black, J., concurring in part and dissenting in part). Justice Black's dissent confronted this tension in stark and explicit terms:

> I cannot help but believe that the inevitable effect of any such law which forces any one of the States to entreat federal authorities in faraway places for approval of local laws before they can become effective is to create the impression that the State or States treated in this way are little more than conquered provinces.

Id. at 359-60 (Black, J., concurring and dissenting).

The court below recognized that this Court's decision upholding Section 5 in *Katzenbach* was a

> "necessary and constitutional response to some states" "extraordinary stratagem[s] of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." ... But [its] belief in *Katzenbach* that the federalism costs exacted by Sec. 5 preclearance could be justified by those extraordinary circumstances does not mean they can be justified in the circumstances of this case.

Bossier Parish, 907 F. Supp. at 444, citing *Miller v. Johnson*, __ U.S. __, 115 S. Ct. 2475, 2493 (1995)) (quoting *Katzenbach*, 383 U.S. at 335). The court below further noted that the federalism costs of Section 5 by itself have been noted throughout its history. *See Georgia v. United States*, 411 U.S. 526, 545 (1973) (Powell, J., dissenting) ("It is indeed a serious intrusion, incompatible with the basic structure of our system, for federal authorities to compel a

State to submit its legislation for advance review"); *Katzenbach*, 383 U.S. at 359-60 (Black, J., dissenting in part) ("[Section 5] gives federal officials power to veto state laws they do not like ... in direct conflict with the clear command of our Constitution that '[t]he United States shall guarantee to every State in this Union a Republican Form of Government'");[3] *Georgia v. Reno*, 881 F. Supp. 7, 13 n.8 (D.D.C. 1995) (noting that the "extraordinary nature of section 5" argued against importing Section 2 into Section 5). Although *Miller* makes no explicit reference to the injection of Section 2 into Section 5, the import of the opinion on this issue is clear. So long as the standard for the "effect" prong of Section 5 remains "nonretrogression," the only way for the DOJ to require the creation of additional majority-black districts before preclearance will be granted is to import the standards of Section 2 into the Section 5 preclearance process. *Bossier Parish*, 907 F. Supp. at 444-45 and n.10.

The Tenth Amendment concerns may be analyzed under this Court's recent revival of Tenth Amendment jurisprudence in analogous situations. In *Gregory v. Ashcroft*, 501 U.S. 452 (1991), for example, this Court relied heavily on the sanctity of state sovereignty in refusing to enforce a federal statute in conflict with a mandatory retirement law for judges. In *New York v. United States*, 505 U.S. 144 (1992), this Court struck down that part of the Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. No. 99-240, 99 Stat. 1842 (1985) (codified at

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[3]One commentator expands on this idea that intrusion into state election laws may deprive those states of a guaranteed republican form of government under Article IV, Section 4, of the United States Constitution--the Guarantee Clause. *See generally* Merritt, *Republican Governments and Autonomous States: A New Role for the Guarantee Clause*, 65 U. COLO. L. REV. 815 (1994).

42 U.S.C. § 2021b, *et seq.*), requiring states either to regulate the disposal of low-level radioactive waste according to Congress' instructions or accept ownership of (and liability for) it. *New York*, 505 U.S. at 149. This Court held that the statute would unconstitutionally force the states to implement legislation enacted by Congress. *Id.* at 188. Using the classifying language of the Voting Rights Act, this Court added, in dicta, that "[s]tates are not mere political subdivisions of the United States." *Id.* Although not doubting Congress' power under the Supremacy Clause to legislate in areas of state law, *Gregory*, 501 U.S. at 457, the Court emphasized that the statutory language must make Congress' intention to do so "unmistakably clear." *Id.* at 460.

The Court echoed Justice Black's states'-rights concerns in *Katzenbach* by reiterating that "[j]ust as 'the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections,'" *Gregory*, 501 U.S. at 461-62 (quoting *Oregon v. Mitchell*, 400 U.S. 112, 124-25 (1970)), so also "[e]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen." *Id.* at 462 (quoting *Boyd v. Thayer*, 143 U.S. 135, 161 (1892)). The mandatory retirement law for judges did not involve voting per se, but did affect the prerequisites to holding state office, as in *Allen v. State Board of Elections*, 393 U.S. 544, 570 (1969). Such electoral authority, the Court said, "lies at 'the heart of representative government.'" *Gregory*, 501 U.S. at 462 (quoting *Bernal v. Fainter*, 467 U.S. 216, 221 (1984)). *Gregory*, in a different context, conveys essentially the same constitutional message as Justice Black's in *Katzenbach*, 383 U.S. at 358-62 (Black, J., concurring in part and dissenting in part). Thus, there is a strong suggestion that *Presley v. Etowah County Commission*, 502 U.S. 491 (1992), decided about six months later, was informed by many of the same concerns for federalism set forth in detail in *Gregory*. Carter, *Mere Voting: Presley v.*

Etowah County Commission and the Voting Rights Act of 1965, 71 N.C. L. REV. 569, 591-93 (1993). As this Court stated, "[i]f federalism is to operate as a practical system of governance and not a mere poetic ideal, the States must be allowed both predictability and efficiency in structuring their governments." *Presley*, 502 U.S. at 510.

Consideration of the likely practical consequences of merging Section 2 and Section 5 demonstrates the magnitude of the intrusion on state autonomy. Because this Court has interpreted what qualifies as a voting "change" very broadly, *see Allen*, 393 U.S. at 563-71, whenever a covered jurisdiction desires to make even a purely administrative change in its voting laws, it would face the daunting prospect of defending its entire electoral system as nondiscriminatory if it is to avoid an inference of discriminatory purpose. Moreover, unlike a Section 2 proceeding in which the plaintiff bears the burden of proof, *see New York v. United States*, 874 F. Supp. at 397, and which may be litigated in a local federal forum, a Section 5 proceeding imposes considerable procedural disadvantages on the state, including the burden of proving that there is no discriminatory effect or purpose, *see Katzenbach*, 383 U.S. at 335,[4] and the inconvenience and expense of litigating in the often distant District of Columbia forum. *See* 42 U.S.C. § 1973c. The prospect of litigation under such terms may well paralyze the state's ability to address routine administrative problems. Consequently, a merger of Sections 2 and 5 would enable the DOJ to wield its preclearance power as a sword to coerce ameliorative steps by a state, rather than as the intended shield against retrogression in minority exercise of the ballot. *See, e.g., McCain v. Lybrand*, 465 U.S. 236, 246 (1984)

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[4]The court below noted the anomolous result where a voting change is conceded to have no retrogressive effect: the state must prove that when "it did nothing bad, it did so with a non-bad motive." *Bossier Parish*, 907 F. Supp. at 446 n.13.

(the Act must be "interpreted in light of its prophylactic purpose and the historical experience which it reflects").

II

NEITHER SECTION 2 NOR EVIDENCE OF AN ALLEGED SECTION 2 VIOLATION MAY BE IMPORTED INTO A SECTION 5 PRECLEARANCE PROCEEDING

Congress amended Section 2 of the Voting Rights Act to address this Court's decision in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), which held that evidence of disproportionate impact was not sufficient to prove a violation of the Fifteenth Amendment or, by extension, Section 2 of the Voting Rights Act. *See Thornburg v. Gingles*, 478 U.S. 30, 35 (1986). To ensure that any voting practice that denied minorities the equal opportunity to participate in the political process could be challenged, regardless of the intent behind its enactment, Congress made major changes to the text of Section 2 which make it clear that plaintiffs do not have to demonstrate purposeful discrimination to prevail. *See id.* at 42-46. Congress also amended the language of Section 4 to incorporate this standard into the bail-out provisions. *See* 42 U.S.C.§ 1973b(a)(1)(F)(I).

At the same time, the temporary legislation contained in Section 5 was extended, but without substantive changes to the statutory language. The DOJ's argument that Section 5 was expanded in similar fashion to Section 2 is meritless. Section 5 was not changed substantively in any way. If Congress intended to revise Section 5 to permit review of electoral practices regardless of when enacted, and regardless of retrogression, the wording of Section 5 surely would have been changed in 1982. That is particularly true in light of the unequivocal construction given to Section 5 in *Beer v. United States*, 425 U.S. at 130.

In *Beer*, the city of New Orleans sought preclearance of a reapportionment plan that would have increased black voting strength. *Id.* at 135-36. The DOJ refused to preclear the plan on the grounds that the new reapportionment was nonetheless discriminatory because it diluted black votes. *Id.* at 136. This Court held that if a proposed change augments minority voter participation, even though it may still have some discriminatory effect, it cannot violate Section 5. *Id.* at 141. Changes are judged under Section 5 relative to what they replace and not in absolute terms. *Id.* at 141. Thus, Section 5 applies only to changes that would lead to a relative retrogression in minority voting. *Id.* Of course, this rule holds true only so long as the proposed change does not otherwise violate the Constitution. *Id.* In *Presley v. Etowah County Commission*, 502 U.S. 491, this Court held that while great deference ordinarily is afforded to the Attorney General's interpretation of the Voting Rights Act, there are limits to that deference. *Presley*, 502 U.S. at 508 ("[d]eference does not mean acquiescence"). Only when congressional intent is unsettled does this Court owe deference to the Attorney General's construction. *Id.* Since this Court found Section 5 unambiguous in limiting its coverage to rules governing voting, it felt no compulsion to defer to the administrative position. *Id.* at 509. Justice Kennedy concluded the Court's opinion by emphasizing that the Voting Rights Act was drafted to fight "specific evils" and should not be stretched beyond recognition to cover all manner and method of discrimination. *Id.*

In *Bush v. Vera*, 116 S. Ct. 1941, decided this Term, this Court again forthrightly stated the limited purpose of Section 5: "§ 5 has a limited substantive goal: 'to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.'" *Bush*, 116 S. Ct. at 1949 (citing *Miller*, 115 S. Ct. at 2483) (quoting *Beer v. United States*, 425 U.S.

130, 141 (1976)). In *Bush*, this Court rejected the argument that seeks to justify "not maintenance, but substantial augmentation, of the African-American population percentage in [the district]." *Bush*, 116 S. Ct. at 1950. Thus, this Court's interpretation of the purpose and scope of Section 5 remained unchanged up to and including decisions rendered this Term. Yet, the DOJ continues to advocate an interpretation of Section 5 that extends far beyond permissible boundaries.

A. Section 2 May Not Be Imported into Section 5

Noting the differences in "structure, purpose, and application" between Sections 2 and 5 (*Bossier Parish*, 907 F. Supp. at 442 (citing *Holder v. Hall*, __ U.S. __, 114 S. Ct. 2581, 2587 (1994))), the court below found that it had no cause to delve into legislative history as an interpretive aid. *Id.* at 442. Nonetheless, common sense and normal rules of statutory construction fully comport with the District Court's decision. Congress does not change a statute's meaning when it does not amend the statute. An analogous argument to that presented by the DOJ in this case arose in *Pierce v. Underwood*, 487 U.S. 552, 567-68 (1988). *Pierce* involved the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, which allows fee awards against the United States in certain cases. Like Section 5, that provision of law was originally enacted as temporary legislation. The Act was extended in 1985 but, before its extension, several lower federal courts had construed EAJA to permit an award of fees only in those cases where the government's conduct had not been "reasonable." When the EAJA was extended in 1985, the provision at issue was unchanged, but a committee report that accompanied the extension legislation stated that the government must show that its conduct was "more than merely reasonable" to avoid attorneys' fees. *Pierce*, 487 U.S. at 566. The plaintiffs in *Pierce* relied on this report in their unsuccessful attempt to invoke the higher standard.

The DOJ's contention that Section 2 should be imported into Section 5 is also based on legislative history. *Bossier Parish*, 907 F. Supp. at 441.[5] However, the Section 5 legislative history is even more attenuated than that at issue in *Pierce*. One footnote buried in the lengthy Senate Committee Report simply states: "[I]n light of the amendment to section 2, it is intended that a section 5 objection also follow if a new voting procedure itself so discriminates as to violate section 2." S. Rep. No. 417, 97th Cong., 2d Sess. 12 n.31 (1982). But, just as in *Pierce*, this passing comment in the legislative history is irrelevant in construing Section 5 because the language of Section 5 itself contained no change, much less the kind of change that would support a radical repeal of the *Beer* retrogression principle. This Court resolved the analogous situation in *Pierce* by holding that the extended, but unamended, terms

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[5]The DOJ's infusion of Section 2 principles into the preclearance proceeding is obvious from the language in its letter of objection that the School Board "is not free to adopt a plan that unnecessarily limits the opportunity for minority voters to elect their candidates of choice," *Bossier Parish*, 907 F. Supp. at 439, and its letter of August 30, 1993: "[T]he proposed plan, adopted by the parish police jury and recommended by the school board's consultant, *would appear to provide no opportunity for black voters to elect a candidate of their choice* to the school board." *Id.* at 445 n.11 (emphasis in original). This language echoes the language of Section 2, which provides that a voting procedure has the prohibited result where "based on the totality of circumstances, it is shown that the political processes ... are not equally open to participation by members of a [protected] class ... in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973b.

of the statute necessarily remained unchanged, and the later legislative history had no weight:

> (Quite obviously, reenacting precisely the same language would be a strange way to make a change.) This is not, it should be noted, a situation in which Congress reenacted a statute that had in fact been given a consistent judicial interpretation along the lines that the quoted Committee Report suggested. Such a reenactment, of course, generally includes the settled judicial interpretation .... Even in the ordinary situation, the 1985 House Report would not suffice to fix the meaning of language which that reporting Committee did not even draft. Much less are we willing to accord it such force in the present case, since only the clearest indication of congressional command would persuade us to adopt a test so out of accord with prior usage.

Pierce, 487 U.S. at 567-68 (citations omitted). In this case, the 1982 amendments to the Voting Rights Act reinforced the validity of the *Beer* retrogression standard because of the presumption that the congressional reenactment of Section 5, without change, constituted congressional approval of prior judicial interpretations.

In *Pierce*, this Court also rejected the 1985 committee report because such a later report is irrelevant in interpreting an earlier statute. "[I]t is the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means. *Id.* at 566-67. In this case, the 1982 Senate Report is similarly irrelevant because (1) it is a meaningless interpretation of the language of Section 5 as originally enacted in 1965, and (2) there was no Section 5 language that the report could be

explaining. Moreover, the sheer scope of the change the DOJ would impart from Footnote 31 of the Senate Report is much greater than the minor change advocated in *Pierce*. Rather than acting as a freezing remedy, the statute would empower the DOJ with authority to review the propriety of every electoral practice of every covered jurisdiction, no matter when enacted. Such an interpretation bears no relationship to the purpose of Section 5. Walbert, *Georgia's Experience with the Voting Rights Act: Past, Present, and Future*, 44 EMORY L.J. 979, 1000-01 (1995) (Walbert). In fact, the DOJ's misuse of legislative history seems a prime example of Justice Scalia's concern in *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment), that "legislative history [is] the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends." The court below correctly refused to endorse the DOJ's theory.

B. Evidence of an Alleged Section 2 Violation May Not Be Used to Demonstrate Discriminatory Purpose in a Section 5 Preclearance Proceeding

1. Failure to Maximize Majority-Minority Districts Does Not Demonstrate Discriminatory Purpose

The DOJ's secondary argument, assuming that this Court declines to import Section 2 into Section 5, is that evidence of a Section 2 violation should be used as evidence of discriminatory purpose under Section 5. *Bossier Parish*, 907 F. Supp. at 445. The purpose prong of Section 5 requires the denial of preclearance if there is a constitutional violation. The purposeful discrimination component of Section 5 is coextensive with the constitutional standard as described in *Washington v. Davis*, 425 U.S. 229 (1976), and *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979). A covered jurisdiction cannot purposefully discriminate on the basis of race, even if there is no adverse effect on blacks as a group. *City of Pleasant Grove v. United States*, 479 U.S.

462, 471 (1987); *City of Richmond v. United States*, 422 U.S. 358, 378-79 (1975). Moreover, the failure of a covered jurisdiction to maximize the number of black-majority districts, by itself, does not support an inference of or otherwise establish a case of purposeful discrimination. States are perfectly free to use other legitimate apportionment criteria as long as they do not rely on race. Blumstein, *Shaw v. Reno and Miller v. Johnson: Where We Are and Where We Are Headed*, 26 CUMB. L. REV. 503, 510 (1995) (Blumstein).

The conclusion that a state has not carried its burden of proof on the intent issue may be justifiable if a state's plan fails to recognize concentrations of minority voters that naturally produce majority black districts under standard districting criteria. Butler, *Affirmative Racial Gerrymandering: Fair Representation for Minorities or a Dangerous Recognition of Group Rights?*, 26 RUTGERS L.J. 595, 607 (1995) (Butler). During the Police Jury public hearing, in which the plan later adopted by both the Police Jury and the School Board was considered, the Police Jury stated that the black population of Bossier Parish was too far-flung to create a majority-minority district. *Bossier Parish*, 907 F. Supp. at 437. This seems to mesh with the fact that the NAACP plan containing two majority-minority districts required 46 precinct splits. *Id.* at 439. When no additional naturally occurring minority districts can be created, discriminatory intent does not appear to be a genuine basis for an objection.

As proof of discriminatory purpose, the probative value of the failure to adopt a plan more favorable to minorities should depend upon how closely the plan matches the state's districting objectives. Commentator Katherine Inglis Butler suggests the following standard: "Was the rejected plan so clearly superior in terms of the state's articulated districting objectives than the plan adopted as to suggest it was rejected for the purpose of avoiding a second majority black district?"

Butler, 26 RUTGERS L.J. at 607 n.41. Without such a standard, the argument becomes nothing more than "failure to adopt the most favorable plan means you intended to deprive blacks of a district," thereby making the de facto standard for Section 5 "maximization" of majority-minority districts. Butler, 26 RUTGERS L.J. at 609-10. In this case, the School Board only had two plans before it at the time it adopted the plan at issue in this case: the Police Jury plan and the NAACP plan. *Bossier Parish*, 907 F. Supp. at 440.

The primary reasons for adopting the Police Jury plan were that it was already precleared, thus avoiding controversy (the Board thought), and it would avoid splitting precincts (a violation of Louisiana law). The School Board demonstrated an interest in districts coterminous with Police Jury districts right after the 1990 census when the School Board asked the Police Jury to consider joint redistricting. *Bossier Parish*, 907 F. Supp. at 438. When the Police Jury rejected the School Board's proposal, the School Board hired the Policy Jury's cartographer who promptly informed the School Board that it could adopt the already precleared Police Jury plan. *Id.* Thus, the idea of using the Police Jury plan did not arise in response to the increasing controversy generated by the NAACP's demands for black majority-minority districts. *See id.* at 438 (noting that the Police Jury plan was first proposed by a School Board member in September, 1991, well before the NAACP expressed its desire to become involved in the process in March, 1992).

It is undoubtedly true that the Police Jury plan is not optimal for the School Board. *See Bossier Parish*, 907 F. Supp. at 458 (Kessler, J., dissenting) (identifying shortcomings related to traditional districting principles). However, the Constitution and the Voting Rights Act Section 5 preclearance procedures do not require adoption of the "best" possible plan. The sole requirement is that the plan comport with the Fifteenth Amendment. If the plan is as egregious as appellants assert, they will have the

opportunity to prove it in a Section 2 action. The court below expressly noted that its ruling would have no impact on a subsequent Section 2 action. *Id.* at 440.

The DOJ's apparent motivation in objecting to the very same plan it had precleared once before was to compel the state to gerrymander as many majority-minority districts as possible. The court below noted: "Defendant denied preclearance noting that the Board had adopted the Police Jury plan when it had before it a plan that provided for 2 of 12 (18%) majority-black districts in a parish with a voting-age population that is 17.6% black. The key to defendant's position in this case, similarly, is that the School Board has not provided an adequate explanation for adopting the precleared Police Jury plan when it had before it the NAACP plan." *Bossier Parish*, 907 F. Supp. at 450.

The DOJ's mission to impose as many minority districts as possible was clearly demonstrated by its intervention in *Johnson v. De Grandy*, __ U.S. __, 114 S. Ct. 2647 (1994). In *Johnson*, the DOJ argued that Section 2 required Florida to create as many majority Hispanic and black districts as possible, even though the state had provided both groups with proportional representation in areas affected by suit. *Id.* at 2659. This Court disagreed, holding that maximization was unnecessary under the law. *Id.* at 2651. To conclude that the state's first plan was discriminatory requires circular reasoning based on an invalid premise: The Act requires that a state take every opportunity to create majority black districts; every opportunity means any opportunity not expressly disallowed by federal law; because the state could have gerrymandered and did not, it therefore chose a plan which did not contain as many majority-minority districts as possible which is intentional discrimination against blacks. Butler, 26 RUTGERS L.J. at 608.

In *Miller*, this Court did not decide whether under the proper circumstances compliance with the Voting Rights

Act, on its own, could be a compelling interest. *Miller*, 115 S. Ct. at 2490-91 ("Whether or not in some cases compliance with the Voting Rights Act, standing alone, can provide a compelling interest independent of any interest in remedying past discrimination ...."). In *Shaw*, this Court once again declined to reach the question, in part because the additional North Carolina majority-black district drawn in that case was not required under a correct reading of Section 5. This Court held that *Miller* forecloses the argument that "failure to engage in the race-based districting would have violated [Section 5]." *Shaw v. Hunt*, 116 S. Ct. at 1903. In *Miller*, which involved an equal protection challenge to Georgia's Eleventh Congressional District, Georgia contended that its redistricting plan was necessary to meet the Justice Department's preclearance demands. The Justice Department had objected to a prior plan that created only two majority-minority districts. This Court held that the challenged congressional plan was not required by a correct reading of Section 5 and, therefore, compliance with that law could not justify race-based districting. *Miller*, 115 S. Ct. at 2491. ("[C]ompliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws.")

This Court reaffirmed the *Miller* holding in *Shaw*, stating that a plan, "'even if [it] fall[s] short of what might be accomplished in terms of increasing minority representation,'" "'cannot violate § 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution.'" *Shaw*, 116 S. Ct. at 1904 (citing *Miller*, 115 S. Ct. at 2492). As in *Miller* and *Shaw*, the United States in this case relies on the purpose prong of Section 5 to explain the Department's preclearance objections, alleging that Bossier Parish, for pretextual reasons, did not create majority-minority district. *Bossier Parish*, 907 F. Supp. at 440 (noting that "all parties agree that the School Board's proposed redistricting will not have

a retrogressive effect"). In *Miller* and *Shaw*, this Court found the Government's position "insupportable." *Shaw*, 116 S. Ct. at 1904; *Miller*, 115 S. Ct. at 2492. The court below properly relied on this Court's holding in this regard. *Bossier Parish*, 907 F. Supp. at 444. The DOJ's arguments are no more compelling now than they were in the prior cases. This Court has firmly held that a "State's policy of adhering to other districting principles instead of creating as many majority-minority districts as possible does not support an inference that the plan 'so discriminates on the basis of race or color as to violate the Constitution,' and thus cannot provide any basis under § 5 for the Justice Department's objection." *Shaw*, 116 S. Ct. at 1904 (citing *Miller*, 115 S. Ct. at 2492 (citations omitted)).

Despite being chastised by this Court in *Miller* and *Shaw* for pursuing its expansive reading of Sections 2 and 5, the DOJ continues in this case to pursue its same policy of maximizing the number of majority-black districts that it pursued in Georgia and North Carolina.

> We explained in Miller that this maximization policy is not properly grounded in § 5 and the Department's authority thereunder. *Miller*, 515 U.S., at __; 115 S. Ct., at 2493 ("In utilizing § 5 to require States to create majority-minority districts wherever possible, the Department of Justice expanded its authority under the statute beyond what Congress intended and we have upheld"). We again reject the Department's expansive interpretation of § 5. *Id.* at __; 115 S. Ct., at 2493. *Cf. Johnson v. De Grandy*, 512 U.S. ___; 114 S.C.. 2647, 2660 (1994) ("Failure to maximize cannot be the measure of § 2").

Shaw, 116 S. Ct. at 1904 (footnote omitted).

2. To the Extent Arizona v. Reno (Relied on by Appellants and the Dissent Below) Permits Inclusion of Evidence of an Alleged Section 2 Violation in a Section 5 Preclearance Proceeding, Arizona v. Reno Should Be Disapproved

In *Arizona v. Reno*, 887 F. Supp. 318 (D.D.C. 1995), *appeal dismissed*, 116 S. Ct. 1037 (1996), the court considered the 'purpose' prong of Section 5. Citing *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 267 (1977), the *Arizona* court held that "the historical background of the challenged decision," is one source of evidence relevant to a determination of discriminatory purpose. The *Arizona* court then held that the DOJ was entitled to reasonable discovery concerning "the extent to which historical discrimination has affected and continues to affect the opportunity for Native Americans in Coconino and Navajo counties to participate in the political process and elect candidates of their choice." *Id.* at 323. The dissent below relied on this holding of the *Arizona* court. *Bossier Parish*, 907 F. Supp. at 455 n.4 (Kessler, J., dissenting). In particular, the *Arizona* court disagreed with the conclusion of a previous panel in *New York v. United States*, 874 F. Supp. 394 (D.D.C. 1994), that the decision to extend an existing discriminatory electoral scheme warrants an inference of discriminatory purpose only when the preexisting system is "blatantly" or "starkly" racist. *Arizona*, 887 F. Supp. at 322. *See* Note, *Recent Case: Arizona v. Reno*, 109 HARV. L. REV. 681, 683 (1996) (Note).

Although the court agreed that the mere extension of an existing discriminatory electoral system is an insufficient basis for inferring discriminatory purpose, it believed that a finding that the existing scheme was discriminatory would be one factor for a court to consider in the discriminatory purpose determination. *See Arizona*, 887 F. Supp. at 322-24. Moreover, because a showing that the existing system

violated Section 2 would not *conclusively* demonstrate that a discriminatory purpose motivated the extension of that system to the election of additional judges, the court rejected Arizona's argument that "permitting discovery into the historical background of its judicial election scheme and past discrimination against Native Americans" would be "tantamount to launching a section 2 proceeding challenging its existing electoral scheme under the guise of section 5." *Id.* at 323. The court thus denied summary judgment to Arizona on the issue of discriminatory purpose and simultaneously denied Arizona's alternative motion to limit discovery on the purpose issue "to the legislative and administrative history of the decisions to add [the] judgeships." *Id.* at 320.

By permitting consideration of the allegedly discriminatory nature of the existing electoral scheme, *Arizona v. Reno* expands the Section 5 inquiry beyond its authorized scope at the expense of state and local autonomy. *Arizona v. Reno* should be disapproved because it fails to acknowledge the congressional intent constraining the scope of a Section 5 proceeding. "The decision's failure to place appropriate limits on the preclearance inquiry raises serious federalism concerns because it allows the DOJ to use preclearance as a leverage point to coerce the ameliorative state action that a Section 5 proceeding cannot command." Note, 109 HARV. L. REV. at 683-84.

As this Court recently stated, to incur a finding that a discriminatory purpose motivated a change, the legislature must have "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,'" its discriminatory effect. *Miller v. Johnson*, 115 S. Ct. at 2488 (quoting *Personnel Administrator v. Feeney*, 442 U.S. at 279). Thus, even if Arizona's existing scheme is discriminatory--and even if the legislators knew that fact--a discriminatory purpose was present only if the discriminatory nature of the system, and not the increased judicial work

load, motivated the legislature's decision to increase the number of judgeships. *See New York*, 874 F. Supp. at 401. That motivation can be determined by an inquiry confined to the administrative and legislative history of the decision to add more judges.

In essence, the DOJ's objective in the *Arizona* case was not to prevent discriminatory voting changes, but to use the preclearance proceeding as a convenient forum to force both counties to change their entire existing electoral scheme from an at-large system to single-member districts. As in *New York*, it was "quite clear that [the DOJ's] real complaint" was that the state's decision to create additional judgeships "was not a step towards ameliorating what [the DOJ] perceive[d] to be a discriminatory electoral system." *New York*, 874 F. Supp. at 401. However, in *Arizona*, as in this case, Section 2 provides the proper remedy for such a claim.

Arguably, allowing a court to consider evidence concerning the preexisting system exceeds the Section 5 inquiry envisioned by Congress even when the system is blatantly racist. An inference of discriminatory purpose, however, is warranted in such a context because the discriminatory effects of the system are obvious to legislators and the public alike, obviating the need for a wide-ranging and extensive evaluation of the preexisting system. *See New York*, 874 F. Supp. at 399 (discussing the inferences that would arise from the extension of a "whites only" voting scheme). The narrow exception carved out by the court in *New York* for blatantly racist systems is the discriminatory-purpose analog of this Court's suggestion in that even absent retrogression--generally a firm requirement for the finding of discriminatory effect--a proposed change might violate Section 5 if the resulting system "so discriminates on the basis of race or color as to violate the Constitution." *Beer*, 425 U.S. at 141, 142 n.14; Note, 109 HARV. L. REV. at 684-85.

This Court has recognized that "'Section 5 was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down.'" *Beer*, 425 U.S. at 140 (quoting H.R. Rep. No. 196, 94th Cong., 1st Sess. 57 (1975)). Thus, Congress enacted Section 5 to ensure that plaintiffs bringing Section 2 suits have a "stationary target to attack," *New York*, 874 F. Supp. at 400, and thus that Section 2 adjudications will have a real and enduring impact on state voting law. The congressional purpose underlying the Section 5 effects prong requires retrogression rather than simply a perpetuation of existing discrimination. *City of Lockhart v. United States*, 460 U.S. 125, 134 and n.10 (1983). Therefore, it must also limit the scope of the purpose prong inquiry to a consideration of evidence directly relevant to the specific decision to implement a change. Any evaluation by a court of the allegedly discriminatory nature of a preexisting electoral system in the course of a Section 5 inquiry oversteps the statutory boundaries between Section 2 and Section 5. Note, 109 HARV. L. REV. at 685.

Indeed, this Court confirmed in *Miller*, 115 S. Ct. 2475, that the Section 5 preclearance requirement exacts "federalism cost" that may not always be justified, particularly when the DOJ wields Section 5 power in pursuit of ends beyond the scope of its statutory authority. *Id.* at 2493. In *Miller*, the DOJ exceeded its statutory authority by denying preclearance to nonretrogressive changes in order to obtain a state apportionment plan that maximized African-American voting strength, a result that Section 5 clearly did not require and that constituted racial gerrymandering in violation of the Fourteenth Amendment. *See id.* at 2490-94. Such misuse of Section 5 power is precisely what *Arizona v. Reno* and the dissent below would allow. By expanding the scope of the Section 5 inquiry beyond that intended by Congress, *Arizona v. Reno* exacts serious and unwarranted federalism costs by forcing states to

defend and justify their entire existing electoral systems before implementing concededly nonretrogressive changes in their voting laws.

CONCLUSION

Appellants in this case seek to merge (both directly and indirectly) two separate and distinct provisions of the Voting Rights Act. Such a merger would not only violate the plain language of the statute and congressional intent, it would also exact federalism costs of the highest order. For the reasons set forth above, the opinion of the United States District Court for the District of Columbia should be affirmed.

DATED: August, 1996.

Respectfully submitted,

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